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**Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms**

# Promotion and protection of human rights and fundamental freedoms while countering terrorism

## Note by the Secretary-General**

The Secretary-General has the honour to transmit to the General Assembly the report of the Special Rapporteur of the Human Rights Council on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, submitted in accordance with Assembly resolution 68/178 and Human Rights Council resolutions 22/8 and 25/7.

* A/71/150.

** The present report was submitted after the deadline in order to reflect the most recent developments.

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# Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

*Summary*

The present report, the sixth annual report submitted to the General Assembly by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, outlines the key activities undertaken by the Special Rapporteur from February 2016 to August 2016, addresses the impact of counter-terrorism measures on the human rights of migrants and refugees and concludes with a series of recommendations.

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# I. Introduction

1. The present report, submitted to the General Assembly pursuant to its resolution 68/178 and Human Rights Council resolutions 22/8 and 25/7, sets out the activities of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism from February 2016 to August 2016, examines the impact of counter-terrorism measures on the human rights of migrants and refugees and presents a series of recommendations.

# II. Activities of the Special Rapporteur

2. The activities of the Special Rapporteur since the issuance of his previous report to the General Assembly (A/70/371) are set forth in his most recent report to the Human Rights Council (A/HRC/31/65).

3. In addition to the activities described in the report, on 8 February 2016, the Special Rapporteur participated in a symposium in Paris on assessing the consequences of counter-terrorism laws and procedures on French society and civil liberties, organized by Amnesty International, the Human Rights League, Human Rights Watch and the International Federation for Human Rights.

4. On 11 February 2016, the Special Rapporteur participated by videolink in a conference on the promotion and protection of the human rights of victims of terrorism, organized in New York by the United Nations Counter-Terrorism Centre, under the auspices of the Working Group on Supporting and Highlighting Victims of Terrorism of the Counter-Terrorism Implementation Task Force.

5. The Special Rapporteur has continued to pursue dialogue with governments, including by sending requests for official visits. He regrets, however, that, despite long-standing requests, no invitations were received during the reporting period.

# III. Impact of counter-terrorism measures on the human rights of migrants and refugees[1]

6. Informed sources are now predicting that, in the absence of an elusive diplomatic settlement or decisive military intervention, the armed conflicts in the Syrian Arab Republic are likely to continue for the next several years. The conflict has already resulted in an unprecedented movement of civilian populations, a phenomenon that has now begun to spread to asymmetrical conflicts in other parts of the world. In that context, the relationship between irregular migration and terrorism raises a number of acute dilemmas in terms of law and policy. Terrorist groups currently control territory and participate in armed conflicts in a number of regions. Governments, international organizations and civil society are increasingly concerned about violent extremism and how to tackle it (see A/HRC/31/65). Associated with those phenomena, there is a growing perception that the movement of people is a threat to national security as many people flee areas where terrorist

[1] The Special Rapporteur wishes to express his thanks to Anne Charbord, Senior Legal Adviser, and Jessica Jones, Legal Adviser, for their assistance in the preparation of the present report.

groups are active, while others migrate into such areas to participate in fighting. As noted in a report of the Secretary-General, "migratory flows have increased both away from and towards the conflict zones, involving those seeking safety and those lured into the conflict as foreign terrorist fighters, further destabilizing the regions concerned" (see A/70/674, para. 2).

7. While data on migration should be used with caution,[2] reliable sources have indicated that, in 2015, the total number of displaced people around the world reached 65.3 million, with more than 12.4 million people forced to leave their homes over the course of the year.[3] According to estimates of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) and the International Organization for Migration (IOM), over 1 million migrants entered Europe in 2015,[4] which represented a significant increase over 2014.[5] Reports that a Syrian passport was found on one of the individuals who had carried out the November 2015 terrorist attack in Paris[6] have contributed to fears that members of terrorist groups might exploit migratory flows. The link between displacement and radicalization has also been drawn, raising concerns that refugee camps could become recruiting grounds for terrorist groups.[7]

8. There is little evidence, however, that terrorists take advantage of refugee flows to carry out acts of terrorism[8] or that refugees are somehow more prone to radicalization than others, and research shows that very few refugees have actually carried out acts of terrorism.[9] As noted by a representative of the Office of the

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[2] Frank Laczko et al., "Migrant arrivals and deaths in the Mediterranean: what do the data really tell us", *Forced Migration Review*, Issue No. 51 (January 2016).

[3] UNHCR, "Global trends: forced displacement in 2015". Available from www.unhcr.org/576408cd7. According to UNHCR, the total number of forcibly displaced people worldwide rose from 51.2 million in 2013 to 59.5 million in 2014.

[4] FRONTEX, "Risk analysis for 2016". Available from http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis_2016.pdf. FRONTEX detected over 1.8 million "illegal" border crossings at the external borders of the European Union in 2015, which it associated with 1 million individuals; and IOM, "Mixed migration flows in the Mediterranean and beyond: compilation of available data and information (2015)". Available from http://doc.iom.int/docs/Flows%20Compilation%202015%20Overview.pdf. According to IOM, 1,046,199 individuals arrived in Europe in 2015, including 1,011,712 by sea.

[5] FRONTEX, "Risk Analysis for 2015". Available from http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2015.pdf. FRONTEX detected 280,000 "illegal" border crossings at the external borders of the European Union in 2014, in contrast with the figure of 1.8 million for 2015.

[6] Marcus Walker and Noemie Bisserbe, "Paris stadium attacker got to Europe using fake Syrian passport", *Wall Street Journal*, 16 November 2015.

[7] Khalid Koser and Amy E. Cunningham, "Migration, violent extremism and terrorism: myths and realities", *Global Terrorism Index 2015: Measuring and Understanding the Impact of Terrorism* (Institute for Economics and Peace, 2015); and World Bank, "Migration and violent extremism in contemporary Europe", 16 March 2016. Available from http://blogs.worldbank.org/peoplemove/migration-and-violent-extremism-contemporary-europe.

[8] UNHCR, "UNHCR chief says it is 'absolute nonsense' to blame refugees for terror", 17 November 2015; and Ishaan Tharoor, "Were Syrian refugees involved in the Paris attacks? What we know and don't know", *The Washington Post*, 17 November 2015.

[9] Kathleen Newland, "The United States record shows refugees are not a threat", October 2015. Available from www.migrationpolicy.org/news/us-record-shows-refugees-are-not-threat.

United Nations High Commissioner for Refugees (UNHCR), "there is a clear perception in some quarters that asylum is misused to hide or provide safe haven for terrorists. Such perceptions are analytically and statistically unfounded, and must change".[10] In its 2016 European Union Terrorism Situation and Trend Report, Europol also noted that there was no evidence that terrorists were systematically using refugee flows to enter Europe.

9. It is critical to bear in mind that, in the clear majority of cases, refugees and migrants do not pose a risk, but are in fact at risk, fleeing the regions where terrorist groups are the most active. Terrorist activity in the country of origin is a significant driver of internal displacement and refugee flight: in 2014, over 16 million refugees and internally displaced persons came from the five countries with the highest levels of terrorism, and approximately 70 per cent of the total population of concern to UNHCR comes from the 20 countries with the highest number of terrorism-related fatalities.[11]

10. Thus, in many cases, migrants and refugees are themselves victims of terrorist violence (see A/HRC/20/14, paras. 11-16). They may either be fleeing the direct consequences of terrorist activity or the broader impact resulting from heightened levels of violence, reduced opportunities and a lack of prospects for themselves and their families.[12] No matter the reason for their flight, people in such circumstances are entitled to protection from the devastating consequences of terrorist activity rather than being stigmatized as potential terrorists,[13] and States must be cautious not to use security concerns as a means of denying humanitarian assistance to those migrants.[14]

11. The Special Rapporteur recognizes that border controls are part of a State's response to terrorist threats and agrees with UNHCR that there should be no avenue for those supporting or committing acts of terrorism to reach other territories, whether to find safe haven, avoid prosecution or carry out further attacks. Nevertheless, an effective response to security threats cannot be based on measures that restrict the movement of refugees and migrants and breach their rights. A worrying trend has been that "institutional and policy structures, migration and border controls have been increasingly integrated into security frameworks that emphasize policing, defence and criminality over a rights-based approach" (see A/HRC/23/46, para. 42).[15] States have introduced stricter border controls, built

[10] Vincent Cochetel, "Terrorism as a global phenomenon", UNHCR presentation to the joint seminar of the Strategic Committee on Immigration, Frontiers and Asylum and Committee on article 36, Ljubljana, 17 and18 January 2008.

[11] Institute for Economics and Peace, *Global Terrorism Index 2015: Measuring and Understanding the Impact of Terrorism* (Institute for Economics and Peace, 2015). Available from http://economicsandpeace.org/wp-content/uploads/2015/11/Global-Terrorism-Index-2015.pdf.

[12] Khalid Koser and Amy E. Cunningham, "Migration, violent extremism and terrorism: myths and realities", in *Global Terrorism Index 2015* (Institute for Economics and Peace, 2015).

[13] See, for example, Security Council resolutions 2170 (2014) and 2258 (2015).

[14] See the address by the Assistant High Commissioner for Protection of UNHCR, Volker Türk, to the 44th INTERPOL European Regional Conference in Prague, 18 May 2016. Available from www.unhcr.org/admin/dipstatements/573c8e987/security-international-refugee-protection-unhcrs-perspective-volker-turk.html.

[15] Within Europe, the focus on police and security is clear from the increased investment in agencies such as FRONTEX. Despite the financial crisis, the FRONTEX budget has steadily increased from €19.2 million in 2006 to €143.3 million in 2015, a 646 per cent increase over eight years.

fences to keep migrants out,[16] engaged in push-back operations, criminalized irregular migration and abandoned pledges to accept refugees.[17] Far from increasing security, such approaches, which restrict access to safe territory, contribute to the establishment of chaotic and covert movements of people,[18] including through trafficking,[19] which might ultimately assist those intent on committing acts of terrorism.

12. It is important to note that there is also migration occurring towards areas where terrorist groups are active. Recent information indicates that there are between 25,000 and 30,000 individuals from more than 100 States involved with groups associated with Al-Qaida, Da'esh and others. Reports issued by the United Nations indicate that the number of fighters involved with those groups increased by 71 per cent between mid-2014 and March 2015 (see E/CN.15/2016/6, paras. 41 and 42). With States intent on preventing the ranks of terrorist groups from growing and preventing returning nationals from carrying out attacks on their own soil (so-called "blowback" attacks) and radicalizing others, decisive action has been taken to address the issue of foreign terrorist fighters pursuant to Security Council resolution 2178 (2014) through national implementation measures.

13. The report focuses on the impact of counter-terrorism measures on the human rights of migrants and refugees,[20] including the impact of measures to deal with migration from areas where terrorist groups are active, addressing the specific challenges of enhanced border controls, guarantees against the abuse of refugee status, the absolute prohibition of refoulement and the detention of migrants (sect. III. A); examines measures to address migration to areas where terrorist groups are active, including the foreign terrorist fighter phenomenon (sect. III. B); and provides relevant conclusions and recommendations (sect. IV). The report builds on the report on refugee protection while countering terrorism, submitted to the General Assembly at its sixty-second session by the previous Special Rapporteur (A/62/263), and the reports of the Special Rapporteur of the Human Rights Council on the rights of migrants (in particular A/HRC/23/46 and A/HRC/29/36). The Special Rapporteur stresses that the report is written from a human rights perspective and draws attention to the mandate and responsibility of UNHCR as

[16] George Jahn, "Austria joins other European Union nations to build fence along borders to slow migrant flow", *The Star*, 28 October 2015.

[17] *Al Jazeera*, "Poland refuses to accept refugees after Brussels attack", 23 March 2016.

[18] See Human Rights Watch, "Blaming refugees or Muslims while missing the boat on terrorism", *World Report 2016: Events of 2015* (New York, Seven Stories Press, 2016); François Crepeau and Anna-Purkey, "Facilitating mobility and fostering diversity: getting European Union migration governance to respect the human rights of migrants", Liberty and Security in Europe, No. 92 (Brussels, CEPS, May 2016); and A/HRC/29/36, paras. 24 and 25.

[19] UNHCR, "Addressing security concerns without undermining refugee protection: UNHCR's perspective", Rev. 2, 17 December 2015.

[20] See Office of the United Nations High Commissioner for Human Rights (OHCHR), "Recommended principles and guidelines on human rights at international borders" (Geneva, 2014), in which an international migrant is defined as "any person who is outside a State of which he or she is a citizen or national, or, in the case of a stateless person, his or her State of birth or habitual residence. The term includes migrants who intend to move permanently or temporarily, and those who move in a regular or documented manner as well as migrants in irregular situations".

being at the core of his mandate and as the basis for his engagement (see A/62/263, para. 33).

## A. Impact on the human rights of migrants and refugees of measures to address migration from areas where terrorist groups are active

### 1. Legal framework

14. The rights and freedoms stipulated in the Universal Declaration of Human Rights apply to migrants and refugees just as they do to any other group of individuals, as do the core rights protected under international customary law and enshrined in the International Covenant on Civil and Political Rights, which applies to "all individuals" within the territory of a State Party and subject to its jurisdiction (art. 2, para. 1). The right to seek and enjoy asylum is protected under article 14 of the Universal Declaration and article 18 of the Charter of Fundamental Rights of the European Union. Refugees are also covered under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.

### 2. Key challenges to the effective protection of migrant and refugee human rights

#### (a) Enhanced border controls

15. The right to reach another State to seek protection is a cornerstone of the system of international refugee protection. Furthermore, pursuant to Security Council resolution 1373 (2001), States are required to prevent "the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents". As noted by the Working Group on Border Management and Law Enforcement relating to Counter-Terrorism of the Counter-Terrorism Implementation Task Force:

> "One significant consequence of the terrorist attacks carried out across the world over recent years is the increased linkage between the movement of people across borders and measures taken to safeguard national security ... measures aimed at preventing terrorism have become explicitly linked to the management and regulation of cross-border movements".[21]

16. Those measures often have a direct impact on the human rights of migrants and refugees. The Special Rapporteur recalls that, while States have a sovereign right to determine conditions of entry and stay in their territories, they also have an obligation to respect and protect the human rights of all individuals under their jurisdiction, regardless of their nationality, origin or immigration status. International borders are not zones of exclusion or exception with respect to human rights obligations, and a the jurisdiction of States at borders must, therefore, be exercised in a manner that is compatible with its human rights obligations towards all persons.[22]

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[21] See www.un.org/counterterrorism/ctitf/en/border-management-and-law-enforcement-relating-counter-terrorism.

[22] See OHCHR, "Recommended principles and guidelines on human rights at international borders", (Geneva, 2014).

17. All border governance measures, including enhanced screening processes at international borders, should always comply with the principles of legality, proportionality, necessity and non-discrimination. Profiling practices based on assumptions that persons of a certain racial, national or ethnic origin or religion are particularly likely to pose a risk may lead to practices with respect to border controls and counter-terrorism measures more generally[22] that are incompatible with the principle of non-discrimination (A/HRC/4/26). The blanket imposition of additional barriers to entry or screening for groups of people based on race, religion, ethnicity, nationality or religion may also constitute discrimination and a disproportionate interference with human rights (see A/HRC/4/26, paras. 35 and 36).[23] Any differential treatment of migrants at international borders must be in pursuit of a legitimate aim and must be proportionate and necessary.

18. Increasingly, States rely on data and intelligence to detect individuals with links to terrorist networks or who may have committed terrorist offences.[24] This has led to the proliferation of border surveillance systems, such as the proposed digital entry-exit system of the European Union.[25] International human rights law requires an evidence-based justification for any interference with the right to privacy, whether on an individual or mass scale. The greater the interference with protected human rights, the more compelling the justification for it must be if it is to meet the requirements of the International Covenant on Civil and Political Rights. Any data that is collected must be necessary for the purposes for which it was collected, and indiscriminate data collection is likely to breach data-protection rights (see A/69/397, paras. 11 and 12). The Special Rapporteur stresses that, while mass surveillance techniques may generate useful intelligence, this is not an adequate human rights law justification for their use, nor does it render mass surveillance lawful or reasonable (see A/69/397, paras. 11 and 12, and A/HRC/27/37, para. 24). As underscored by the Office of the United Nations High Commissioner for Human Rights (OHCHR), the collection of data at borders, in particular biometric data, must be accurate and up-to-date, proportionate to a legitimate aim, obtained lawfully, stored for a limited time and disposed of safely and securely. Border authorities must be trained properly on the risks, limitations and human rights impact of the technologies used.[22]

19. Information-sharing systems, such as the European Border Surveillance System, through which States members of the European Union and Schengen-associated countries exchange border management information with FRONTEX,

[23] House Democratic Caucus "Screening procedures for Syrian refugees". Available from https://price.house.gov/uploads/Screening%20Procedures%20for%20Syrian%20Refugees.pdf.

[24] See "National security: threats at our borders", testimony of Eleanor Acer before the United States House of Representatives at the joint subcommittee hearing of the Oversight and Government Reform Committee, the Subcommittee on National Security and the Subcommittee on Government Operations (23 March 2016).

[25] European Commission, "Communication from the Commission to the European Parliament and the Council: stronger and smarter information systems for borders and security" (Brussels, 6 April 2016). Available from http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/securing-eu-borders/legal-documents/docs/20160406/communication_on_stronger_and_smart_borders_20160406_en.pdf.

raise additional risks.[26] All information must be gathered, stored and shared with sufficient safeguards to protect rights and must not be shared with third countries that might expose migrants and refugees to human rights violations, including refoulement or inhuman treatment.[27] The unlawful collection of data, such as the reported forced fingerprinting of migrants as part of their registration at European borders,[28] is an affront to individual dignity and may encourage the establishment of precarious covert routes between countries.

20. As the Special Rapporteur on the human rights of migrants noted in 2015, many migrants are already resorting to precarious routes between States because of a lack of regular migration opportunities (see A/HRC/29/36). States must recognize that irregular migration is often a feature of the flight of genuine refugees. Moreover, the Special Rapporteur recalls that migration is not a crime.[29] Accordingly, the term "illegal migrants" should not be used to refer to migrants in an irregular situation (see resolution 3449 (XXX)). States should not criminalize irregular entry or irregular stay,[22] and international refugee law expressly provides that refugees should not be penalized for illegal entry under certain conditions.[30] States should ensure that all measures aimed at addressing migration, including irregular migration, do not have an adverse impact on the human rights and dignity of migrants.[22]

### (b) Guarantees against abuse of refugee status

21. As noted in above-mentioned report to the General Assembly at its sixty-second session, "unwarranted linkages between refugee protection and terrorist threats were made evident soon after the atrocious terrorist attacks of 11 September 2001" (A/62/263, para. 34). In its resolution 1373 (2001), the Security Council called upon States to take appropriate action, before granting refugee status, in conformity with national and international law, including international human rights law, to ensure that the asylum-seeker has not planned, facilitated or participated in terrorism. In the same resolution, States were called upon to ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts.[31] Those provisions reinforce the misperception that international refugee law is an obstacle when it comes to addressing security concerns.

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[26] Ben Hayes and Mathias Vermeulen, "Borderline: the European Union's new border surveillance initiatives — assessing the costs and fundamental rights implications of EUROSUR and the 'Smart Borders' proposals" (Heinrich Böll Foundation and The Greens/European Free Alliance, June 2012).

[27] European Union Agency for Fundamental Rights, *Fundamental Rights at Europe's Southern Sea Borders* (Luxembourg, Publications Office of the European Union, 2013).

[28] François Crépeau and Anna Purkey, "Facilitating Mobility and Fostering Diversity: getting EU Migration Governance to Respect the Human Rights of Migrants", Liberty and Security in Europe, No. 92 (Brussels, CEPS, May 2016). Available from https://www.ceps.eu/system/files/LSE%20No%2092%20Facilitating%20Mobility.pdf.

[29] See, for example, François Crépeau, "Mainstreaming a human rights-based approach to migration within the high-level dialogue", statement by the Special Rapporteur on the human rights of migrants, 2 October 2013.

[30] Convention relating to the Status of Refugees (1951) article 31.

[31] See also resolution 51/210.

22. The Special Rapporteur recalls that the 1951 Convention relating to the Status of Refugees was drafted by individuals who had lived through some of the darkest times of the twentieth century. They were well aware of the need to exclude certain individuals from the protective provisions of refugee law. Thus, while the Convention does not explicitly exclude terrorists,[32] it does take into account the security interests of host communities,[17] and international refugee law provides for the exclusion from refugee status of those who have committed heinous acts or serious crimes (see A/62/263, para. 35).[12]

### (i) Exclusion from refugee status and acts of terrorism

23. Article 1(F) of the 1951 Convention relating to the Status of Refugees allows States to deny refugee status to certain persons, including in cases when there are "serious reasons for considering" that they have committed crimes against peace, war crimes or crimes against humanity, serious non-political crimes outside the country of refuge prior to their admission to that country as a refugee or have been guilty of acts contrary to the purposes and principles of the United Nations.[33] As noted by UNHCR, although "acts commonly considered to be terrorist in nature are likely to fall within the exclusion clauses, article 1(F) is not to be equated with a simple anti-terrorism provision".[34] Exclusions can apply more broadly.

24. The intention of the drafters of the 1951 Convention relating to the Status of Refugees was for article 1(F)(*c*) to apply in exceptional circumstances to cover human rights violations. However, the observation in resolution 1373 (2001) that "acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations" and that "knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations" has meant that national jurisdictions are increasingly relying on article 1(F)(*c*) to exclude individuals.[35] According to UNHCR, acts that are properly considered to be terrorist in nature, and that are grave enough to affect international peace and security and friendly relations between States, may also fall within the scope of those grounds for exclusion.[22]

25. As with any exception to human rights guarantees, the exclusion clauses must always be interpreted in a restrictive manner and applied with utmost caution (see A/62/263, para. 66).[36,37] In particular, the Special Rapporteur notes that, in examining whether the exclusion clauses apply, national authorities should not rely on the country of origin's definition of terrorism. Many States have adopted overly

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[32] Ben Saul, "Exclusion of Suspected Terrorists from Asylum", Institute for International Integration Studies, Discussion paper, No. 26 (July 2004).

[33] Acts of terrorism can fall within more than one ground of exclusion from refugee status (see *Al-Sirri v. Secretary of State for the Home Department* and *DD (Afghanistan) v. Secretary of State for the Home Department*, judgment of 21 November 2012, No. UKSC 54, para. 3).

[34] See UNHCR statement on article 1(F) of the 1951 Convention relating to the Status of Refugees, July 2009.

[35] Sandesh Sivakumaran, "Exclusion from refugee status, the purposes and principles of the United Nations and article 1(F)(*c*) of the Refugee Convention", *International Journal of Refugee Law*, vol. 26, No. 3 (October 2014).

[36] Committee Against Torture, general comment No. 2 on article 2.

[37] UNHCR, "Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the status of refugees" (Geneva, 2011), para. 180.

broad definitions of terrorism which cover peaceful dissent or acts which are lawful under international humanitarian law.[38] The proper approach to the application of the exclusion clauses is for States to assess whether the acts in question meet the requisite level of seriousness,[39] and whether national provisions comply with the principles of legality, certainty and foreseeability (see A/HRC/16/51, paras. 26-28).

26. The Special Rapporteur notes that the presence of an individual on a list of terrorist suspects or a list of members of a designated terrorist organization should not, in itself, lead to an automatic application of the exclusion clauses, nor a reversal of the burden of proof to the detriment of the individual concerned.[34] Indeed, the presence of an individual or a group on a terrorist list must be addressed with caution. In this regard, the Special Rapporteur has already provided a comprehensive overview of the various shortcomings of the Al-Qaida Sanctions List (see A/67/396 and A/HRC/29/51, para. 38). Although the process is improving, some key concerns remain, including: the lack of transparency in the listing process (see S/2016/96, paras. 36 and 52); the absence of access for petitioners to the comprehensive reports on their cases (see S/2016/96, para. 38); the lack of proper safeguards for the independence of the Office of the Ombudsperson (see S/2016/96, para. 44); the Ombudsperson's limited access to confidential information (S/2016/96, para. 16); and the non-binding status of the Ombudsperson's comprehensive reports. As a consequence, the regime continues to fall short of international minimum standards of due process. Regional and national lists, drawn up pursuant to resolution 1373 (2001), may also lack fair procedures for listing and de-listing and suffer from procedural and due process shortcomings.

27. Thus, neither the presence of an individual on a list as a terrorist suspect nor their membership in a group listed as a terrorist entity should lead to an automatic application of the exclusion clauses[34,40] or be the sole basis for denying an individual refugee status.[34,35,41] An assessment of individual responsibility must be carried out on a case-by-case basis, giving careful consideration to the particular role and personal involvement of the person concerned.[31]

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[38] International Committee of the Red Cross, "The applicability of IHL to terrorism and counterterrorism", October 2015.

[39] Minor offences, even if domestically classified as terrorist crimes, should not lead to exclusion. The commission of acts that constitute elements of an act of terrorism, including killing, abduction and torture, generally constitute "serious" crimes.

[40] In the case *Bundesrepublik Deutschland v. B und D*, the European Court of Justice decided that the listing of an organization "makes it possible to establish the terrorist nature of the group of which the person concerned was a member, which is a factor the competent authority must take into account when determining, initially, whether that group has committed acts falling within the scope of Article 12(2)(b) or (c) of Directive 2004/83" (i.e., the exclusion grounds).

[41] See Supreme Court of Canada, *Ezokola v. Canada (Minister of Citizenship and Immigration)*, 2013, SCC 40, No. 34470; United Kingdom Supreme Court, *R (on the application of JS) (Sri Lanka) v. Secretary of State for the Home Department*, No. [2010] UKSC 15; and United Kingdom, *T v. Secretary of State for the Home Department* (1996); United Kingdom: House of Lords (Judicial Committee), 22 May 1996; and New Zealand: Refugee Status Appeals Authority, refugee appeal No. 74540, 1 August 2003.

### (ii) Expulsions and revocation of refugee status and terrorism

28. Once refugee status has been granted, it is still possible for a State to revoke it or to expel individuals based on their being involved in or convicted of acts of terrorism. The Special Rapporteur recalls the position of UNHCR that generalized suspicions based on religious, ethnic or national origin or political affiliation do not justify a general review process, much less a re-opening of a final refugee status determination. A review would be possible, however, if, as part of procedures offering adequate safeguards, it emerged that there were serious reasons for considering that the refugee had committed acts that fell within the purview of the exclusion clauses.[22] Provisions such as those in force in the United Kingdom of Great Britain and Northern Ireland that provide for the revocation of refugee status for "extremist behaviour" or which require that "where there is any evidence that a refugee or their dependants have engaged in unacceptable behaviours (whether in the UK or abroad) considered not conducive to the public good or have acted in a way which undermines British values, their status must be reviewed" go beyond what is permitted by the 1951 Convention relating to the Status of Refugees (see A/HRC/31/65).[42]

29. International refugee law allows States to expel refugees on grounds of national security or public order. It is critical that decisions to expel must be non-discriminatory and proportionate, made on a case-by-case basis, through procedures which respect standards of due process, in which the threat to security posed by the individual is substantiated and in which the individual can provide evidence that might counter the allegations.[22]

### (c) The absolute prohibition of refoulement

30. The principle of non-refoulement is a fundamental principle of international law prohibiting the expulsion, return or extradition of persons to a State when there are substantial grounds for believing that they would face the risk of being tortured (see A/HRC/13/39/Add.5, para. 238), face a serious violation of other fundamental rights[43] or be subject to refoulement by the receiving State (indirect or "chain" refoulement). It is the responsibility of the sending State to assess the general situation in the receiving State and the risk facing the particular individual.[44] The manner in which the refoulement occurs is irrelevant to the prohibition, meaning that it also applies to persons refused at borders or pushed back on the high seas. The principle of non-refoulement is broader under international human rights law than under international refugee law. Even individuals who do not qualify for or are excluded from refugee status or to whom an exception to the non-refoulement principle applies, pursuant to article 33(2) of the 1951 Convention relating to the Status of Refugees, may still be covered by the absolute prohibition of refoulement under human rights law.

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[42] United Kingdom Home Office, "Asylum policy instruction: revocation of refugee status", 19 January 2016, p. 14.

[43] European Court of Human Rights, *Othman (Abu Qatada) v. the United Kingdom*, application No. 8139/09, judgment of 9 May 2012.

[44] On systematically targeted minority groups, see Committee against Torture, *Abed Azizi v. Switzerland*, communication No. 492/2012, decision of 27 November 2014; and *Hussein Khademi et al. v. Switzerland*, communication No. 473/2011, decision of 14 November 2014.

31. In recent years, challenges to the non-refoulement principle have been numerous and widespread.[45] Many States have tried to assert that the imperative of fighting terrorism allows all human rights, even those that are absolute, to be weighed against it. States have thus argued that it is necessary to deport dangerous individuals, even to places where there is a real risk that they may be subjected to ill-treatment, in order to protect the population from terrorist threats (see A/HRC/13/39/Add.5, para. 240). While that approach may be in line with the exceptions in article 33(2) of the 1951 Convention relating to the Status of Refugees,[46] it has been rejected by international human rights bodies[47] and regional courts.[48] The Special Rapporteur highlights in that respect that international human rights law fills an important gap in refugee law.

32. In response to the absolute prohibition of refoulement, some States have relied on diplomatic assurances obtained from foreign authorities that they would refrain from torturing an individual upon return (see A/HRC/13/39/Add.5, para. 244; and E/CN.4/2006/6, para. 29). A former High Commissioner for Human Rights described such arrangements as unacceptable since they do not provide adequate protection against torture and ill-treatment[49] and cannot displace the legal obligation of States with respect to non-refoulement (see A/HRC/4/88). A former Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment described diplomatic assurances as "nothing but attempts to circumvent the absolute prohibition of torture and non-refoulement".[50] International human rights bodies have clarified that, while diplomatic assurances are not prohibited in all circumstances, they do not absolve a State from its obligation to assess the risk of torture given the individual circumstances of the case.[51] The Committee against Torture has recommended that diplomatic assurances should only be relied upon with regard to States that do not systematically violate the provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (see CAT/C/USA/CO/2, para. 21). The Special Rapporteur concurs with the position of the Committee.

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[45] World Organization against Torture, "Non-refoulement: achievements and challenges". According to the World Organization against Torture, as of 2014 the Human Rights Committee had raised non-refoulement concerns in 147 concluding observations with regard to 96 State parties.

[46] See also the ruling of the Supreme Court of Canada in *Manickavasagam Suresh v. Canada (Minister of Citizenship and Immigration)*, in which the Court accepted that refoulement could occur in exceptional circumstances if a substantial risk to the national security of the State was proven. No Canadian court has yet found that such exceptional circumstances exist.

[47] See CAT/C/18/D/39/1996, para. 14.5; CAT/C/SR.652, para. 59; CAT/C/NPL/CO/2, para. 17; CAT/C/FRA/CO/3, para. 6; and CCPR/C/CAN/CO/5, para. 15.

[48] In the case of *Saadi v. Italy*, the European Court of Human Rights noted, in response to the third party intervention by the United Kingdom, that the "immense difficulties" for States to protect their communities from the danger of terrorism "must not, however, call into question the absolute nature of article 3", application No. 37201/06, judgment of 28 February 2008, para. 137. Note that, in a later case with a similar outcome, Lithuania, Portugal, Slovakia and the United Kingdom made similar arguments. See European Court of Human Rights, *A. v. the Netherlands*, application No. 4900/06, judgment of 20 October 2010.

[49] Committee against Torture, views on Communication No. 233/2003, *Agiza v. Sweden*, judgment of 20 May 2005 (A/60/44, annex VIII, sect. A), and Human Rights Committee, views on Communication No. 1416/2005, *Alzery v. Sweden*, 25 October 2006 (A/62/40 (vol. II), annex VII).

[50] See A/HRC/13/39/Add.5, para. 243; E/CN.4/2006/6, para. 32; and A/HRC/10/44/Add.2, para. 68.

33. Some of the gravest violations of human rights today are committed by or on behalf of non-State actors, including terrorist networks. An increasing number of asylum seekers are fleeing such atrocities. If international human rights law is to keep pace with those changes, the victims of such acts must now be recognized as victims of grave violations of international human rights law (see A/HRC/20/14, para. 12). The Special Rapporteur emphasizes that the principle of non-refoulement must apply when the individual would run a real risk of ill-treatment if transferred to territory controlled by non-State armed groups. In territories where the real risk of danger to life or ill-treatment emanates from non-State armed groups, relocation to a safer part of the country can be considered.[51] However, if a State is failing to "stop, sanction and provide remedies to victims of torture",[33] it can be difficult to "identify particular areas of the country which could be considered safe for the complainants in their current and evolving situation",[52] and a returning State's non-refoulement obligation must take that into account.

34. "Maritime interception operations", "push-back operations" and "search and rescue operations" on the high seas, such as the Mediterranean Sea and the Indian Ocean (see A/62/263), including those that aim to carry out the blanket return of rescued migrants to one country,[53] are a serious cause for concern in relation to non-refoulement obligations. As the Parliamentary Assembly of the Council of Europe has observed:

> "While the absolute priority in the event of interception at sea is the swift disembarkation of those rescued to a 'place of safety', the notion of 'place of safety' does not appear to be interpreted in the same way by all member States. Yet it is clear that the notion of 'place of safety' should not be restricted solely to the physical protection of people, but necessarily also entails respect for their fundamental rights".[54]

[51] For the guarantees that should be in place as a precondition of relying on an internal flight alternative, see the ruling in relation to Somalia: European Court of Human Rights, *Sufi and Elmi v. UK*, application No. 8319/07, judgment of 28 June 2011. In relation to the situation in Syria, see *LM v. Russia*, application No. 4081/14, judgment of 15 October 2015. In relation to Iraq, see European Court of Human Rights, *A.G.A.M., D.N.M., M.K.N., M.Y.H. and Others, N.A.N.S., N.M.B., N.M.Y. and Others and S.A. v. Sweden*, applications Nos. 71680/10, 28379/11, 72413/10, 50859/10, 68411/10, 68335/10, 72686/10 and 66523/10, judgments of 27 June 2013.

[52] The Committee Against Torture applied this in the case of *Njamba and Balikosa v. Sweden*, Comm. 322/2007, 3 June 2010.

[53] See Niels Franze, "NATO expands Aegean Sea migrant patrols into Turkish and Greek territorial waters: rescued migrants to be automatically returned to Turkey", 7 March 2016. Available from https://migrantsatsea.org/2016/03/07/nato-expands-aegean-sea-migrant-patrols-into-turkish-and-greek-territorial-waters-rescued-migrants-to-be-automatically-returned-to-turkey/.

[54] Parliamentary Assembly of the Council of Europe, resolution 1821 (2011), para. 5.2.

35. The Special Rapporteur recalls that the non-refoulement principle applies extraterritorially,[55] including when individuals are under the effective control of a State acting outside its territory or territorial waters. Any State that sends vessels to carry out interception or search and rescue operations is obliged to respect the prohibition on refoulement and not return individuals to countries where they would face a real risk of danger to their lives, ill-treatment or other fundamental rights violations.

36. It is possible that push-back operations may also violate the prohibition on collective expulsion if the transfer of individuals occurs without an examination of the situation of each individual.[56] The prohibition of collective expulsion under international law imposes a duty of due process, and push-back operations without an individualized assessment are thus generally impermissible, even if there is no risk of refoulement.[57] There must be a reasonable and objective examination, in accordance with the law and free from any arbitrariness, of the full range of circumstances that may militate against the expulsion of each particular individual.[58] Furthermore, the returning State must ensure that the destination country offers sufficient guarantees in the application of its asylum policy to prevent the person concerned from being returned to his country of origin without an assessment of the risks faced.[59]

37. There are serious concerns about bilateral or multilateral readmission agreements and the risk they pose to fundamental rights (see A/HRC/29/36, para. 39).[58] In this respect, the Special Rapporteur is concerned about the European Union-Turkey statement, agreed to on 18 March 2016, which provides for the blanket return of all migrants crossing from Turkey into Greece. The agreement has been widely criticized, even though it is noted in the statement that "this will take place in full accordance with European Union and international law, thus excluding any kind of collective expulsion" and that "all migrants will be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement". Of particular concern are returns in the absence of individual assessments of migrants' situations that, despite the above statement, may amount to collective expulsion,[60] and reports that Turkey may violate the rights of individuals[61]

[55] See European Court of Human Rights (Grand Chamber), *Hirsi Jamaa and Others v. Italy*, application No. 27765/09, judgment of 23 February 2012; UNHCR, Advisory opinion on the extraterritorial application of non-refoulement obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, 26 January 2007; and "UNHCR legal position: despite court ruling on Sri Lankans detained at sea, Australia bound by international obligations", press release, 4 February 2015. Conversely, see Inter-American Commission on Human Rights, *Haitian Centre for Human Rights and Others v. United States*, case No. 10.675, judgment of 13 March 1997, para. 157.

[56] European Court of Human Rights (Grand Chamber), *Hirsi Jamaa and Others v. Italy*, application No. 27765/09, judgment of 23 February 2012.

[57] See Jan Arno Hessbruegge, "European Court of Human Rights protects migrants against 'push back' operations on the high seas", *Insights*, vol. 16, No. 14 (2012).

[58] OHCHR, Intervener brief of the case of the European Court of Human Rights, *N. D. and N. T. v. Spain*, application Nos. 8675/15 and 8697/15, 9 October 2015.

[59] European Court of Human Rights, *Sharifi and Others v. Italy and Greece*, 21 October 2014.

[60] Human Rights Watch, "European Union: Turkey mass-return deal threatens rights — would harm refugees, undermine European Union's principles", 15 March 2016.

[61] Human Rights Watch, "Q and A: the European Union-Turkey deal on migration and refugees", 3 March 2016.

by detaining them contrary to human rights law and in violation of the principle of non-refoulement.[62] The Special Rapporteur is also concerned that the current proposal for a new European border and coast guard agency would give it competence to carry out return operations from third country to third country, provided that the sending country complies with the European Court of Human Rights.[63] The Special Rapporteur recalls that a State's human rights obligations, including those relating to non-refoulement and indirect or chain refoulement, remain,[64] despite any statement, agreement or any other presumption with respect to a State's compliance with international human rights law.[65]

38. The Special Rapporteur recalls that the procedural guarantees for non-refoulement exist wherever individuals may find themselves, on land or at sea.[56] The Special Rapporteur thus recommends that procedures for challenging a decision to return an individual be made available to all migrants and refugees at points of disembarkation.[66] If they are not made available, or if other human rights violations are committed during rescue and interception operations, border authorities must be held accountable even if the violations occur extraterritorially.[26] Joint operations involving several States and international or regional bodies may be

[62] See Amnesty International, "Turkey 'safe country' sham revealed as dozens of Afghans forcibly returned hours after European Union refugee deal", 23 March 2016; "Europe's gatekeeper: unlawful detention and deportation of refugees from Turkey", 16 December 2015; and "European Union-Turkey deal: Greek decision highlights fundamental flaws", 20 May 2016. On the appeal won by a Syrian national who arrived in Greece against a decision that would have led to his forcible return to Turkey, see Human Rights Watch, "Turkey: border guards kill and injure asylum seekers — border lock-down puts Syrian lives at risk", 10 May 2016.

[63] European Commission, "Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No. 2007/2004, Regulation (EC) No. 863/2007 and Council Decision 2005/267/EC" (Strasbourg, 15 December 2015).

[64] European Court of Human Rights (Grand Chamber), *M. S. S. v. Belgium and Greece*, application No. 30696/09, judgment of 21 January 2011, and *Sharifi and Others v. Italy and Greece*, application No. 16643/09, judgment of 21 October 2014. On specific obligations relating to children, see *Tarakhel v. Switzerland*, application No. 29217/12, judgment of 4 November 2014.

[65] See Council of the European Union, "Outcome of the Council meeting" (20 May 2016), in which it was noted that "member States shared the analysis made by the Commission on the measures taken by Turkey since 20 March, including its assessment that Turkey has taken all the necessary steps identified in the communication of 16 March. Member States expressed their conviction that migrants can and should be returned to Turkey in conformity with the European Union-Turkey statement of 18 March". See also European Commission, "Communication from the Commission to the European Parliament, the European Council and the Council: second report on the progress made in the implementation of the EU-Turkey statement" COM(2016) 349, 15 June 2016; the bilateral readmission agreement between Greece and Turkey (1999); and the European Union-Turkey readmission agreement published in Turkey's official journal, 20 May 2016. See also Eric Maurice, "Turkish leader parts ways with the European Union", *EU Observer*, 6 May 2016 and Merve Aydoğan, "Ankara halts readmission agreement with EU, disagrees on anti-terrorism laws", *Daily Sabah*, 6 June 2016, and "Libéralisation des visas en Turquie: Erdogan refuse de réviser la loi antiterroriste", *Le Monde*, 7 May 2016.

[66] The Special Rapporteur on the human rights of migrants has urged the European Union to allow migrants to disembark immediately at the nearest port (A/HRC/29/36, para. 64).

a cause for concern, as a lack of oversight and clear lines of responsibility can lead to impunity on the part of those engaging in such operations.[67]

### (d) Detention of migrants

39. As noted by the Special Rapporteur on the human rights of migrants, the systematic detention of irregular migrants has come to be viewed as a legitimate tool.[68] While it is recognized that an unprecedented strain has been placed on the immigration and humanitarian systems in frontline countries such as Greece (see A/HRC/27/48/Add.2), respect for the fundamental rights of migrants and refugees must be the primary concern of States, and such persons must not be detained in conditions that fail to meet basic human rights standards.[69] In a worrying recent development, it has been reported that, following the European Union-Turkey statement, some national authorities have started automatically detaining migrants and refugees, with the help of FRONTEX, without considering alternatives, providing reasons for the detention or considering the particular situation of those vulnerable people.[70]

40. While it is not disputed that States have the right to detain foreigners prior to deportation and extradition, detention should always be a last resort and must comply with the principle of legality. Exhaustive reasons must be given, and deterring irregular migration can never be a legitimate ground for detention. In all cases, detention must be necessary, reasonable and proportionate. The detention of children, however, can never ever be in their best interest:[71] alternatives to detention must be provided to unaccompanied migrant children and families with children. As such, indefinite or mandatory detention should be prohibited. Detention may become arbitrary when the State does not have any intention of deporting or extraditing the individual; when the State is not diligent enough in carrying out asylum, deportation or extradition procedures, or when the procedures take too long; and when, for legal or practical reasons, the deportation or extradition becomes impossible. In addition, the procedural guarantee of habeas corpus must always be provided, as well as minimum conditions of detention that safeguard the individual's dignity.

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[67] As observed by the Council of Europe "there are inadequate guarantees of respect for human rights and obligations arising under international and European Union law, in the context of the joint operations coordinates" (Parliamentary Assembly resolution 1821 (2011), para. 5.4). On responsibility for joint operations, such as NATO and FRONTEX, see Manfred Nowak and Anne Charbord, "Prohibition of torture and inhuman or degrading treatment or punishment", in Steve Peers and others, eds., *The EU Charter of Fundamental Rights: A Commentary* (Oxford, United Kingdom, Hart Publishing, 2014).

[68] A/HRC/23/46, paras. 47-52, and CCPR/C/CAN/CO/6, para. 12.

[69] European Court of Human Rights, *Affaire A. Y. v. Greece*, application No. 58399/11, judgment of 5 November 2015; *Khlaifia and Others v. Italy*, application No. 16483/12, judgment of 1 September 2015; *E. A. v. Greece*, application No. 74308/10, judgment of 30 July 2015; *Mahammad and Others v. Greece*, application No. 48352/12, judgment of 15 January 2015.

[70] Human Rights Watch, "Greece: asylum seekers locked up, wretched conditions for people in need", 14 April 2016; Amnesty International, "Greece: refugees detained in dire conditions amid rush to implement EU-Turkey deal", 7 April 2016.

[71] Committee on the Rights of the Child, "Report of the 2012 Day of General Discussion: the rights of all children in the context of international migration".

41. States have repeatedly attempted to use administrative detention as a means of dealing with foreign nationals considered to be a security threat (see A/62/263, paras. 40-48). As a former High Commissioner for Human Rights noted in 2006, "countries are using various laws at their disposal — asylum, immigration, extradition and so on — to remove persons alleged to constitute national security threats from their territories. In particular one sees an attempt to avoid the heavy due process requirements of the criminal system by turning instead to the administrative law framework".[72] That tendency was observable in Canada's certificates under the Immigration and Refugee Protection Act of 2001 for detention of foreign nationals for up to 120 days without review, followed by removal and in the United Kingdom's indefinite detention of foreign terror suspects under the Anti-terrorism, Crime and Security Act of 2001. These schemes were deemed by national and international courts to be either unconstitutional and/or discriminatory and/or in breach of fundamental rights.[73] It is crucial that, amid mounting terrorism concerns and increased numbers of migrants and refugees moving into foreign territories, States do not resort to similar measures that violate human rights.

## B. Measures to address the "foreign terrorist fighter" phenomenon

42. The issue of foreign fighters is not a new phenomenon, but it has increased significantly in importance with the armed conflicts in Iraq and the Syrian Arab Republic (see A/HRC/29/51). According to the Analytical Support and Sanctions Monitoring Team established pursuant to Security Council resolution 1526 (2004), the phenomenon of foreign terrorist fighters has evolved to an unprecedented degree over the past four years and now poses an acute and growing threat to international security (see S/2015/358). While evidence of the involvement of foreign fighters in recent terrorist attacks has, in many cases, yet to be substantiated (S/2015/683, para. 68), the United Nations and a number of States have taken action to address that threat to national security.

### 1. United Nations resolutions

43. In its resolution 68/276, the General Assembly called upon Member States to address the foreign terrorist fighter threat by enhancing cooperation and developing relevant measures, including information-sharing, border management and appropriate criminal justice responses. In its resolution 2170 (2014), the Security Council called upon Member States to undertake measures to suppress the flow of fighters to join Da'esh and other individuals, groups and entities associated with Al-Qaida in Iraq and the Syrian Arab Republic. In its resolution 2178 (2014), the Council required that further steps be taken in relation to foreign terrorist fighters, defined as "individuals who travel to a State other than their States of residence or

[72] Louise Arbour, United Nations High Commissioner for Human Rights, "In our name and on our behalf", speech at the Chatham House and the British Institute of International and Comparative Law, 15 February 2006.

[73] Supreme Court of Canada, *Charkaoui v. Canada*, judgment of 23 February 2007; Human Rights Committee, communication No. 1051/2002, *Ahani v. Canada* (CCPR/C/80/D/1051/2002); House of Lords, United Kingdom, *A. and Others v. Secretary of State for the Home Department*, judgment of 16 December 2004; European Court of Human Rights (Grand Chamber), *A. and Others v. the United Kingdom*, application No. 3455/05, judgment of 19 February 2009.

nationality for the purpose of the perpetration, planning or preparation of, or participation in, terrorist acts or receiving of terrorist training, including in connection with armed conflict". Member States are required to prevent the travel of foreign terrorist fighters, to bring them to justice, and to prohibit the funding, organization or facilitation of their travel, including acts of recruitment. Resolution 2178 (2014) is a "legislative resolution, with teeth".[74] It forms part of a preventive criminal justice strategy against terrorism: the acts are punishable per se, before the principal terrorist offences are committed, attempted or specifically planned.

44. Resolution 2178 (2014) includes a strong human rights clause, which reaffirms not only that any measure taken to counter terrorism, including those taken to implement the resolution, must respect international human rights obligations, but it also highlights the importance of respect for the rule of law in counter-terrorism, noting that a failure to do so contributes to radicalization and a sense of impunity. In the resolution, the Security Council noted that terrorism will not be defeated by military, law enforcement and intelligence operations alone, and underlined the need to address the conditions conducive to terrorism, as set forth in Pillar I of the United Nations Global Counter-Terrorism Strategy (see resolution 60/288).

45. As the Special Rapporteur has highlighted elsewhere, there are well-founded concerns about resolution 2178 (2014) (see A/HRC/29/51), including: the broad nature of some of the provisions and the lack of definitions for the terms "terrorism" and "extremism"; the legal uncertainty of efforts to identify those to whom it is intended to apply;[75] the vague and low standard for enforcement action in response to "credible information" that an individual will engage in relevant acts; the stigmatization caused by and the ramifications and imprecision of the labelling of individuals as "terrorists" and "fighters";[76] and the requirement that airlines provide advance passenger information to detect individuals travelling on civilian aircraft who may be foreign terrorist fighters. As stated above, increased border controls and data sharing must respect the principle of non-discrimination and comply with data protection norms. Practices that allow systematic checks of individuals who are

[74] Martin Scheinin, "Back to post-9/11 panic? Security Council resolution foreign terrorist fighters", September 2014.

[75] Daphne Richemond-Barak and Victoria Barber, "Foreign volunteers or foreign fighters? The emerging legal framework governing foreign fighters", *Opinio Juris*, 6 May 2016. Available from http://opiniojuris.org/2016/05/06/foreign-volunteers-or-foreign-fighters-the-emerging-legal-framework-governing-foreign-fighters/.

[76] See the report of the Independent International Commission of Inquiry on the Syrian Arab Republic, entitled "Rule of terror: living under ISIS in Syria", 14 November 2014, paras. 17 and 29. See also Jessica Stern and J-M Berger, *ISIS: The State of Terror* (New York, Harper Collins Publishers, 2015), which notes that ISIL, in an article in its online English-language magazine, *Dabiq*, called for doctors, engineers, scholars and people with military, administrative and service expertise. See also Jayne Huckerby, "Gender, violent extremism and countering violent extremism", *Just Security*, 3 March 2015.

considered to pose a risk following a risk assessment[77] must be based on objective, specific intelligence and behavioural indicators, and not on broad profiles based on ethnicity, religion or race.

### 2. National implementation measures

46. The Special Rapporteur urges States to ensure that national measures operationalizing Security Council resolution 2178 (2014) fully comply with international human rights law, including the principle of legality enshrined in article 15 of the International Covenant on Civil and Political Rights. The Special Rapporteur is particularly concerned that the criminalization of offences, such as receiving training for terrorism or travelling abroad for the purpose of terrorism, would rely on national definitions of terrorism that are sometimes overly broad or vague.[78] The criminalization of ancillary offences, which arise from conduct that may be distant from the principal terrorist offence, may also be incompatible with the principle of legality.[78] States have adopted a number of legislative measures, sometimes complemented by administrative and operational measures,[79] to prevent the departure of foreign fighters to conflict areas as well as to prevent the return of foreign fighters from those areas. Those include the seizure, retention, withdrawal and non-renewal of passports or identity cards, the stripping of citizenship, restrictions on travel or entry to territory and various types of house arrests or preventive detention. All of these can have a serious impact on a number of fundamental rights (see A/HRC/29/51).

47. The effective prosecution of the acts covered by resolution 2178 (2014) are a key component in the overall approach of States to foreign terrorist fighters. The Special Rapporteur is cognizant of the difficulties faced by States in prosecuting preparatory or accessory acts relating to foreign terrorist fighters. As noted by the

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[77] The annex to the Commission recommendation of 15 June 2015 states that "based on an analysis of the risks for internal security or analysis of the threats that may affect the security of external borders, checks may be carried out systematically on those persons which fall under this risk assessment" and that "w]ith a view of detecting persons returning back to the European Union from the conflict zones where they were combatting or supporting terrorist organizations, the border guards may systematically check against the databases on particular travel patterns (e.g. flights coming from the geographical areas in the vicinity of conflict zones) a certain category of persons falling under the risk assessment". Common risk indicators concerning foreign terrorist fighters were finalized in June 2015, in close cooperation with national experts, the European External Action Service, European Union agencies and INTERPOL (these have not been made public).

[78] See also the submission of Amnesty International and the International Commission of Jurists to the Council of Europe Committee of Experts on Terrorism, draft additional protocol to the Convention on the Prevention of Terrorism of the Council of Europe, 7 April 2015.

[79] By way of example, in April 2016, the European Union Commission flagged the following as priority measures to be implemented by States: the systematic inclusion and flagging of information relating to terrorism in the Schengen Information System (the European Union's largest security database) and the systematic sharing of information on returning foreign terrorist fighters with Europol's European Counter-Terrorism Centre; the use of common risk indicators to detect terrorist travel when carrying out border checks at the external Schengen border; systematic security checks and registration of all new arrivals at "hotspots" (first reception centres); systematic interviewing and screening of all returning foreign terrorist fighters to assess the level of risk they pose; and the rapid adoption and implementation of the passenger name record directive.

Counter-Terrorism Committee Executive Directorate in its third report on the implementation of resolution 2178 (2014):

> "In most States, prosecutions are undermined by difficulties in collecting admissible evidence abroad, particularly from conflict zones, or in converting intelligence into admissible evidence against foreign terrorist fighters. Several States have experienced challenges associated with generating admissible evidence or converting intelligence into admissible evidence from information obtained through information and communications technology, particularly social media. The pre-emptive investigation and prosecution of suspected foreign terrorist fighters is a further challenge for all regions, particularly in the light of due process and human rights concerns." (see S/2015/975).

48. In its recent report, the Commission on Crime Prevention noted that "building a solid criminal case requires overcoming major operational or legal challenges. Those include the difficulty in gathering evidence located abroad, in proving the intentional element of the crime or offence committed, and the choice of the right criminal charge." (E/CN.15/2016/6, para. 55).

49. States must ensure fairness at all stages in a prosecution. In particular, States must guarantee the right to a fair trial by an independent and impartial tribunal and must not rely on evidence or intelligence obtained through torture. The Special Rapporteur is concerned that, in order to facilitate prosecutions, legislation that may fall short of human rights standards has been adopted. For example, the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism fails to require that there be a causal link between certain offences, such as travelling abroad for the purpose of terrorism, and the principal act of terrorism. That arguably encourages the enactment of national laws that define offences that are overly broad. The Special Rapporteur agrees with the recommendation made by some non-governmental organizations that, in criminalizing training for terrorist purposes or travelling abroad for the purpose of terrorism, the specific intent to carry out, contribute to or participate in an act of terrorism should be an element of the crime.[78,80]

50. Some jurisdictions have enacted as offences the entering or remaining in a "declared area" in which a "listed organization is engaging in hostile activity"[81] or travelling to a "country designated to be a terrorist training country".[82] The offence

[80] Note that intent is currently a requirement in the draft articles 7 to 10 of the European Commission's "Proposal for a directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism", which criminalizes, inter alia, travelling for terrorist purposes in order to counter the phenomenon of foreign terrorist fighters; the funding, organization and facilitation of such travel, including through logistical and material support, the provision of firearms and explosives, shelter, means of transportation, services, assets and goods.

[81] See the Criminal Code Act (1995) of Australia, as amended 2014. On 2 March 2015, the Minister for Foreign Affairs declared the Mosul district in the Ninewa province of Iraq to be an area where a listed terrorist organization was engaging in hostile activity. The declaration went into effect on 3 March 2015.

[82] See the Prevention of Terrorism Act (2012) of Kenya, art. 30(C)(1): "A person who travels to a country designated by the Cabinet Secretary to be a terrorist training country without passing through designated immigration entry or exit points shall be presumed to have travelled to that country to receive training in terrorism."

is considered to have been committed regardless of whether there was any terrorist purpose to the travel, that is, it is sufficient that the individual entered the area or the country without being able to show that the purpose of the travel was covered by one of the exceptions.[83] Those provisions reverse the burden of proof, placing the onus on individuals to prove that their travel falls within an exception. Such legislative techniques may conflict with the right to a fair trial, in particular the respect for the presumption of innocence under article 14 of the International Covenant on Civil and Political Rights, which is a non-derogable right.[84]

51. Finally, the Special Rapporteur stresses that, when returning foreign fighters are suspected of having committed war crimes or other international crimes, such as crimes against humanity, that is the basis upon which they should be prosecuted. It may be procedurally quicker and politically expedient to prosecute them under "ordinary" counter-terrorism legislation, but individuals who may be guilty of international crimes should not go unpunished for those crimes.

# IV. Conclusions and recommendations

52. **Areas in which terrorist groups are active or party to armed conflicts are a push factor for victims of terrorism to seek safety and a pull factor for foreign terrorist fighters. However, the current discourse focuses on migration as a fuel for terrorism, which has led to migration policies being viewed overwhelmingly through the prism of security.**

53. **States have the obligation to protect their populations from acts of terrorism. That may include adopting a number of border management and immigration-related measures to identify individuals who have committed or are planning terrorist offences. However, asylum and migration policies that are restrictive or that violate human rights can have a counterproductive effect on the efforts of States to counter terrorism by creating more irregular migration and increasing violations of the human rights of migrants and refugees, marginalizing particular communities and reducing prospects for migrants, all of which could become conditions conducive to terrorism. The Special Rapporteur recalls, in particular, that the dehumanization of victims of terrorism has been unanimously recognized by the General Assembly, in the United Nations Global Counter-Terrorism Strategy, as a condition conducive to the spread of terrorism. It is also possible that the stigmatization of certain communities is precisely what terrorist groups seek and may lead to an increase in support among migrant communities.**

54. **As part of an effective counterterrorism policy, it is essential to have a comprehensive migration policy that respects human rights, justice, accountability,**

[83] Compare section 119.2(3) of the Australian legislation to article 30(C)(2) of Kenya's Prevention of Terrorism Act.

[84] See Human Rights Committee, general comment No. 32, para. 6 (CCPR/C/GC/32). See also the Explanatory Memorandum to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill of 2014, which states that this new offence "does not reverse the onus of proof or presumption of innocence. To the extent that there is a limitation on article 14 of the International Covenant on Civil and Political Rights, those limitations are reasonable, necessary and proportionate to countering the threat posed to Australia and its national security interests".

**human dignity, equality and non-discrimination, and that grants victims of terrorism the protection to which they are entitled. Security and the protection of the rights of migrants are not opposing goals; they are complementary and mutually reinforcing.**

55. **The Special Rapporteur makes the following recommendations:**

(a) **International borders are not zones of exception from human rights: States must respect their human rights obligations when exercising their jurisdiction at international borders;**

(b) **Irregular migration should not be criminalized: the integrity of freedom of movement, the right to seek asylum and refugee law must be respected;**

(c) **Exclusion from refugee status, expulsions of refugees and revocation of refugee status must always comply with the principles of legality, proportionality, non-discrimination and due process: the presence of an individual on a terrorist list or his membership in a listed organization should not be the sole basis for exclusion;**

(d) **The absolute prohibition of refoulement under international human rights law must always be respected, wherever a State exercises its jurisdiction, even on the high seas: States must respect their non-refoulement obligations even when the risk of ill-treatment emanates from non-State armed groups, including terrorist groups; and all decisions must be taken on a case-by-case basis, respect the prohibition of collective expulsions and comply with due process guarantees;**

(e) **The detention of migrants, refugees and asylum-seekers should always be a last resort: detention must always comply with the principle of legality, and the grounds for detention must be exhaustively listed; minimum conditions of humane and dignified detention must always be respected; detention must never become arbitrary and must always be necessary, reasonable and proportionate; and since the detention of children can never be in their best interest, alternatives to detention must always be provided to unaccompanied migrant children and families with children;**

(f) **All measures taken to address the threat posed by foreign terrorist fighters must comply with international human rights law; specific offences that criminalize related training or travel must comply with the principle of legality; and all prosecutions for those offences must fully comply with fair trial guarantees, in particular those relating to the presumption of innocence.**

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Item 69 (b) of the provisional agenda*
**Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms**

# Rights to freedom of peaceful assembly and of association**

## Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, submitted in accordance with Human Rights Council resolution 24/5.

* A/71/150.
** The present report was submitted after the deadline in order to reflect the most recent developments.

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# Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association

*Summary*

The present report examines the exercise and enjoyment of the rights to freedom of peaceful assembly and of association in the workplace, with a focus on the most marginalized portions of the world's labour force, including global supply chain workers, informal workers, migrant workers, domestic workers and others.

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# I. Introduction

1. The present report is the fourth report of the Special Rapporteur submitted to the General Assembly in accordance with Human Rights Council resolution 32/32.

2. In this report, the Special Rapporteur addresses the environment essential to the realization of the rights to freedom of peaceful assembly and of association in the context of labour, and highlights laws, practices and systemic issues that violate those rights.[1] The Special Rapporteur notes that labour rights are workers' human rights.[2] Freedom of peaceful assembly and association are foundational rights precisely because they are essential to human dignity, economic empowerment, sustainable development and democracy. They are the gateway to all other rights; without them, all other human and civil rights are in jeopardy.

3. States are obligated under international law to respect, protect and fulfil workers' rights to freedom of peaceful assembly and of association. Those obligations include both positive and negative duties. Moreover, States are obliged to uphold those rights both "within their national jurisdiction and when they act at the international arena, whether individually, bilaterally or multilaterally" (see A/69/365, para. 16).

4. In many cases, States fail to protect or enforce those fundamental rights and often do not create an enabling environment for even the minimum exercise of those rights, disenfranchising millions of workers. That exacerbates global inequality, poverty, violence and child and forced labour, and directly contributes to problems such as human trafficking and slavery. This report takes into account the impact of globalization on the enjoyment of the rights of disenfranchised workers, including the roles played by global governance processes, States, employers and other relevant stakeholders in respecting, protecting and fulfilling those rights.

5. This report also provides recommendations on how States can promote improved respect for workers' assembly and association rights, thereby strengthening the rule of law, including workers' access to justice, while reducing inequality, poverty and disenfranchisement. The recommendations are based on international human and labour rights standards and instruments, and were developed in consultation with civil society, human rights, women's rights, States and labour rights organizations.

6. In preparing for this report, the Special Rapporteur convened an expert meeting on 5 and 6 May 2016 in Diani, Kenya. He benefited greatly from the discussions, and expresses his gratitude to the Solidarity Center and the International Centre for Not For Profit Law for co-organizing the event, and all the participants for their contributions. He further expresses appreciation to those who

[1] The Special Rapporteur is conscious of the language in paragraph 5 (g) of Human Rights Council resolution 15/21, which established his mandate, advising against the duplication of work already conducted by the International Labour Organization and its specialized supervisory mechanisms. The broader right to freedom of association, however, unequivocally applies in the workplace and there can be no serious discussion of association and assembly rights globally without considering the challenges surrounding workers' enjoyment of their rights.

[2] For the purpose of this report, the Special Rapporteur uses the term "worker" in its broadest possible context.

shared their experiences through other means, such as responding to his questionnaire. The Special Rapporteur also took into account relevant elements of work available within the United Nations system.[3]

7. Finally, the Special Rapporteur wishes to extend his deepest appreciation to the Solidarity Center for the research assistance it provided, which extensively informed this report.

## II. Conceptual framework

8. In recent decades, economic globalization, implemented with as few regulations on companies and capital as possible, has been touted by many economists as an essential vehicle to global prosperity and the end of poverty. The economic system that grew out of that philosophy has indeed led to a rise in global economic productivity and wealth, but it has also contributed to a dramatic rise in the power of large multinational corporations and concentrated wealth in fewer hands. At the same time, States' power to regulate those business entities has eroded. Further, the world's recent economic growth has not been shared equally. Productivity and economic output have increased, but so has inequality, with the fruits of that growth going primarily to the wealthiest.[4]

9. Unconstrained power, whether public or private in origin, is a critical threat to the protection of human rights, including workers' rights to freedom of peaceful assembly and of association. The worldwide crackdown on those rights is contributing to a global crisis of governance. Multinational corporate wealth is multiple times greater than that of many States.[5] While lead multinationals are legally responsible for their operations within their domestic nation States, those laws do not extend to their actions abroad and they are not legally accountable for the vast number of rights violations that occur in multiple countries down their supply chains. Workers, on the other hand, are bound and restricted by the national laws where they work. Moreover, labour's traditional tools for asserting rights — trade unions, strikes, collective bargaining and so on — have been significantly weakened across the globe. That situation has effectively allowed the global supply chain to override sovereign democracy.

10. The majority of the world's workers, including informal, women, domestic, migrant and agricultural workers and day labourers, are often excluded from national legal protective frameworks, leaving them unable to exercise their

[3] Some situations mentioned in the report have been the subject of communications sent to Governments, and of press releases and reports issued by special procedures mandate holders and high-level officials of the United Nations.

[4] See "An economy for the 1 per cent: how privilege and power in the economy drive extreme inequality and how this can be stopped", *Oxfam Briefing Paper*, No. 210 (18 January 2016). Available from https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp210-economy-one-percent-tax-havens-180116-en_0.pdf.

[5] See Nicholas Freudenberg, "The 100 largest government and corporations by revenue", 27 August 2015. Available from www.corporationsandhealth.org/2015/08/27/the-100-largest-governments-and-corporations-by-revenue/.

fundamental rights to associate or assemble, and without access to remedies when their rights are violated.[6]

11. Without assembly and association rights, workers have little leverage to change the conditions that entrench poverty, fuel inequality and limit democracy. The need to maintain paid work is all-consuming: so many workers toil long hours for low wages in unsafe and unhealthy environments, risking disease, injury and death. They work without basic social protections such as health care, education, pensions or, in the case of trafficked workers, the right to choose or leave employment. The impact of the lack of assembly and association rights is compounded for migrant workers by harsh immigration laws, unscrupulous labour recruitment organizations, militarized labour systems and rights-restricted structures in export processing zones. Migrant domestic and agricultural workers, often excluded from labour law protection both at home and abroad, are doubly exploited and marginalized.

12. Women in the global economy are often relegated to low-paying, low-skills jobs. Persistent gender-based violence suppresses the individual and collective assertion of their rights to resist exploitative/abusive employers or State authorities. Further, certain groups of workers, including women, internal and external migrants, racial, ethnic, religious and sexual minorities, dispossessed rural workers and others, are often disenfranchised from the start by their status, making it more difficult to assert rights.

13. Disenfranchisement is the shared condition of these workers and predominates across countries and global supply chains. Whether intentional or not, the legal environment for these workers promotes labour markets that fundamentally depend on powerless workers and a low-wage environment. Employers and others who evade the law and disrespect standards gain a competitive advantage over compliant employers, at the cost of workers' rights to freedom of peaceful assembly and of association.

14. Further, the lack of effective cross-border and national legal and enforcement frameworks rewards and spreads non-compliance, even lawlessness. Violence by State and private actors against trade unionists, rights activists and peacefully striking workers often deals the final blow to workers' attempts to exercise their assembly and association rights.

15. States' failure to enforce laws and regulations has strongly contributed to the inability of workers to exercise their assembly and association rights. Without any realistic legal or democratic political recourse, workers are condemned to a new poverty. A report of the International Labour Organization (ILO) on the end to poverty initiative notes: "Poverty does not simply 'happen' to our world of work. Rather, our world of work and our labour markets are generating poverty, or at least proving inadequate to get rid of it".[7] Whether wilful or simply inadequate, decision-

[6] See "Unprotected labour: what role for unions in the informal economy?", Labour Education 2002/2, No. 127 (International Labour Organization (ILO), 2002). Available from www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/publication/wcms_111464.pdf.

[7] International Labour Organization, *The End to Poverty Initiative: The ILO and the 2030 Agenda*, ILC.105/DG/IB (Geneva, 2016), para. 37.

and law-making have weakened workers' ability to exercise fundamental rights and created a legal system that is unenforceable against either States or multinational enterprises and fails to protect those rights.

16. The rights to freedom of peaceful assembly and of association are fundamental worker rights. Since they enable people to voice and represent their interests, they are key to the realization of both democracy and dignity, to holding Governments accountable and to empowering human agency. These rights are also a means to level the unequal relationship between workers and employers, thereby helping workers correct abuses and gain access to fair wages, safe working conditions[8] and a collective voice.

17. At the same time, the global attack on labour rights has made it disturbingly clear that the old ways of defending workers' rights are no longer working. Our world and its globalized economy are changing at lightning pace, and it is critical that the tools we use to protect labour rights adapt just as quickly. A first step towards that goal is to obliterate the antiquated and artificial distinction between labour rights and human rights generally. Labour rights are human rights, and the ability to exercise those rights in the workplace is a prerequisite for workers to enjoy a broad range of other rights, whether economic, social, cultural, political or otherwise.

## III. Challenges to workers' rights to freedom of peaceful assembly and of association: global pressures on workers' rights and State response

18. The rise of multinational companies has driven structural changes in the global economy aimed at cutting costs, increasing corporate profits and limiting corporate responsibility to workers.[9] Production and the provision of services are divided among different places with different employers in different countries. That has allowed lead firms to shift production of goods and services to companies in countries with lower costs and fewer regulations, putting pressure on manufacturers and service providers in global supply chains to cut costs.[10] These structural shifts have drastically changed traditional employment relationships and systems.

19. Today, an estimated 60.7 per cent of the world's workers labour in the informal economy, where employment relationships are not legally regulated or

[8] See Virginia Mantouvalou, "Organizing against abuse and exclusion: the associational rights of undocumented workers", in Cathryn Costello and Mark Freedland, eds., *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford, United Kingdom of Great Britain and Northern Ireland, Oxford University Press, 2014), p. 381.

[9] See Radhika Balakrishnan, Lisa McGowan and Cassandra Waters, "Transforming women's work: policies for an inclusive economic agenda" (American Federation of Labour and Congress of Industrial Organizations, Solidarity Center and Rutgers University, 2016), p. 10.

[10] See International Labour Organization, *Decent Work in Global Supply Chains*, http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_468097.pdf.

socially protected (another 13 per cent work on fixed-term contracts).[11] In some developing countries, informal jobs comprise up to 90 per cent of available work.[12]

20. While the informal economy has always existed, deregulation and the development of global supply chains have exponentially expanded its growth. The informal economy includes self-employed workers, employees of informal enterprises, day labourers, market vendors, temporary, part-time or contract workers and more.[13] Informal workers can be teachers, agricultural workers, call centre workers, taxi drivers, waste pickers or workers who make deliveries, among others.

21. Informal work is often characterized by poor employment conditions, low wages and lack of protection against non-payment of wages, layoffs without notice or compensation, compulsory overtime, unsafe and unhealthy working conditions, and the absence of social benefits such as health insurance, sick leave, pensions or social security.[14] Because they are generally outside the framework of labour law protection, informal workers have little access to justice and less opportunity to assemble, form or join unions, or bargain for higher wages or better working conditions. Their lack of fundamental rights leaves them with little ability to hold accountable those who have power over them and strips them of the power to change their conditions. States, working with employers, are choosing who is or is not covered by union rights.

22. Millions of informal workers labour in global supply chains, where some of the worst abuses of freedoms of association and peaceful assembly are found and where migrant workers are often concentrated.[15] States often weaken labour rights in order to attract investment, establishing special export processing zones where freedoms of peaceful assembly and of association are either sharply curtailed or explicitly prohibited. States may also use investor agreements as excuses to weaken labour standards.

23. Global supply chains are putting downward pressure on wages and working conditions, and distancing workers from their rights to freedom of association because workers fill permanent jobs but are denied permanent employee rights. These arrangements — found in both formal and informal work, including part-time, short-term or temporary contracts, on-call schedules, multilayered

[11] See Martha Alter Chen, *The Informal Economy: Definitions, Theories and Policies*, WEIGO Working Paper, No. 1 (August 2012). Available from http://wiego.org/sites/wiego.org/files/publications/files/Chen_WIEGO_WP1.pdf, and ILO, *World Employment Social Outlook: The Changing Nature of Jobs* (Geneva, 2015). Available from www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_368626.pdf.

[12] See Malcolm Sharara, "Many Zimbabweans live below food poverty-World Food Programme", *Fin24*, 19 May 2016. Available from www.fin24.com/Economy/many-zimbabweans-live-below-food-poverty-line-wfp-20160519.

[13] See Martha Alter Chen, *The Informal Economy: Definitions, Theories and Policies*, WEIGO Working Paper, No. 1 (August 2012). Available from http://wiego.org/sites/wiego.org/files/publications/files/Chen_WIEGO_WP1.pdf.

[14] See www.ilo.org/global/topics/employment-promotion/informal-economy/lang--en/index.htm.

[15] See International Labour Organization, *Decent Work in Global Supply Chains*, ILC.105/IV (Geneva, 2016). Available from www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_468097.pdf, pp. 25 and 32.

subcontracts or franchises,[16] and bogus self-employment schemes — are designed to drive down costs.[17] As a result of the widespread use of this practice, 1.5 billion people — 46 per cent of the world's total number of workers — are working in so-called "precarious employment". In both Southern Asia and sub-Saharan Africa, more than 70 per cent of workers are employed that way.[18]

24. Women tend to be concentrated in the bottom levels of the global supply chain, in sectors with lower pay, less prestige and fewer benefits, such as the garment, electronic assembly and service sectors.[19] More women than men work in agriculture, where they comprise approximately 70 per cent of the informal workforce.[20] Further, women usually constitute 60 to 90 per cent of the workforce in special economic zones, where worker protections are sharply reduced or eliminated in order to attract foreign investment.[21]

25. Lead firms contribute to rights violations through sourcing practices and the threat of exit, should costs increase, and they are usually immune to legal accountability. In most cases, there is no jurisdiction or legal cause of action over the enterprise in its home country for the violations that are eventually carried out by a supplier.[22]

26. In some countries administrative or judicial processes are too slow, weak or corrupt. When workers who seek to associate and form a union are fired, they find no effective remedy, either at home against the local firm, or abroad against the lead firm that may have contributed to the violation. Without legal consequences, the situation is unlikely to change.

## A. Migrant workers

27. Globalization is taking place in the context of the largest migration of people in human history, from rural to urban areas, within countries and across borders. According to recent ILO estimates, the world has 150.3 million migrant workers.[23] An estimated 112.3 million of them (74.7 per cent) are in high-income countries.[24]

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[16] See Radhika Balakrishnan, Lisa McGowan and Cassandra Waters, "Transforming women's work: policies for an inclusive economic agenda" (American Federation of Labour and Congress of Industrial Organizations, Solidarity Center and Rutgers University, 2016), p. 10.

[17] See International Labour Organization, *Decent Work in Global Supply Chains*, p. 23. Available from http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_468097.pdf.

[18] See International Labour Organization, *World Employment and Social Outlook: Trends 2016* (Geneva, 2016).

[19] See Radhika Balakrishnan, Lisa McGowan and Cassandra Waters, "Transforming women's work: policies for an inclusive economic agenda", (American Federation of Labour and Congress of Industrial Organizations, Solidarity Center and Rutgers University, 2016), p. 7.

[20] Ibid.

[21] Ibid., p. 11.

[22] See International Labour Organization, *Decent Work in Global Supply Chains*, ILC.105/IV (Geneva, 2016), p. 42. Available from www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_468097.pdf.

[23] See International Labour Organization, *Global Estimates of Migrant Domestic Workers: Results and Methodology* (Geneva, 2015).

[24] Ibid.

They migrate to support their families and improve their future, but their lack of rights and agency in the workplace often leaves them, and their children, mired in poverty.

28. Low-wage migrant workers face severe economic exploitation, social exclusion and political disenfranchisement. They are often denied their freedoms of peaceful assembly and of association because of their irregular status or by structural barriers in legal channels that systematically disempower workers. Exorbitant recruitment fees leave them with unrepayable debt. In the destination country, they are often paid low wages or not paid at all. They are subject to unsafe and unhealthy working and living conditions, and gender-based violence. They are typically without access to health care, leave or other social benefits. Many find themselves trafficked, in conditions of forced labour or slavery, isolated, unpaid, with restricted freedom of movement and no access to justice. Because most migrant workers are effectively barred from forming and joining unions, they are unable to advocate to improve wages and working conditions. Migrants have become a massive, disposable, low-wage workforce excluded from remedies or realistic opportunities to bargain collectively for improved wages and working conditions.

29. Having legal status does not ensure workers can exercise their fundamental rights. Most temporary or circular migration programmes structurally deny or inhibit rights to assembly and association and leave workers at the mercy of employers. Two such programmes are the Middle East *kafala* and United States guest-worker programmes. In many Middle East countries (such as Bahrain, Kuwait, Oman, Saudi Arabia and Qatar), this hyper-rigid system ties a migrant worker's presence in the country to a visa sponsored by a citizen. Workers' ability to reside, work or even leave the country is subject to the approval and whims of a migrant's sponsor, who has near total control over the worker's existence.[25] Nearly the same is true in United States guest-worker programmes, where visas are tied to specific employers.[26] From a legal standpoint, these States have delegated oversight, control and responsibility for foreign nationals to private companies and individuals. Such devolution of responsibility has led to gross abuses and denial of fundamental rights.

30. Every year the United States has more than 100,000 guest workers on temporary H-2 work visas in sectors like landscaping, construction, seafood processing and agriculture. Although they are documented migrants, guest workers report being cheated of their wages, threatened with guns, beaten, raped, starved and imprisoned. Some have died on the job.[27] The link between the visa and employer provides a coercive element: workers who complain about working conditions can

[25] See International Trade Union Confederation (ITUC), "The case against Qatar: host of the FIFA 2022 World Cup — ITUC special report" (Brussels, 2014). Available from www.ituc-csi.org/IMG/pdf/the_case_against_qatar_en_web170314.pdf.

[26] See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20317&LangID=E#sthash.mXdGRS7D.dpuf.

[27] See Jessica Garrison, Ken Bensinger and Jermy Singer-Vine, "The new American slavery: invited to the United States, foreign workers find a nightmare", 24 July 2015. Available from https://www.buzzfeed.com/jessicagarrison/the-new-american-slavery-invited-to-the-us-foreign-workers-f?utm_term=.ywzOzJKYW#.gp0jykNYK.

be fired, and must leave the country or face deportation. This contingent relationship quells workers' efforts to exercise freedom of association and assembly.[28] Workers who attempt to exercise their rights are often blacklisted by employers, who use the threat of denied future work opportunities to silence workers.[29]

31. In the United Kingdom, gang-master-controlled work in the hospitality, food-processing and agriculture sectors often exploits migrant workers through wage theft or confiscation of passports. The prospect of dismissal and loss of the legal right to work and remain in the country chills the exercise of rights by these workers. Because police investigations tend to focus more on immigration enforcement than claims of serious maltreatment of migrant workers,[30] access to justice is denied. Forced labour is also a significant and growing problem in the United Kingdom.[31]

32. Intimidation is common to the migrant worker experience. In 2015, 245 Zimbabwean migrant workers were harassed, intimidated and suffered retaliation (and four of them physical violence) after they organized to ask for a wage increase on a vegetable farm in South Africa. They had worked 12-hour days, seven days a week, and 17-hour days during the vegetable harvest, but were paid about half the minimum wage.[32] They were forcibly evicted in September 2015, but later vindicated in court, when the judge found they were owed back pay or reinstatement.[33]

33. Violence with impunity is also common. In Mexico, migrant farmworkers at one of the country's biggest tomato exporters were physically assaulted when they complained about lack of food or tried to leave the work camp where they were kept "as prisoners". Camp bosses threatened workers who demanded their illegally withheld pay. The indebted workers could not enjoy their assembly and association rights for fear of losing wages that would not be paid until the harvest. The company received World Bank financing and supplied major United States grocers.[34]

[28] See Shannon Lederer, "Top 10 ways guest worker visa programmes undermine immigrant rights", 9 September 2015. Available from www.aflcio.org/Blog/Political-Action-Legislation/Top-10-Ways-Guest-Worker-Visa-Programs-Undermine-Immigrant-Rights.

[29] Ibid.

[30] Submission from UNISON.

[31] See Hsiao-Hung Pai, "The lessons of Morecambe Bay have not been learned", *The Guardian*, 3 February 2014. Available from https://www.theguardian.com/commentisfree/2014/feb/03/morecambe-bay-cockle-pickers-tragedy.

[32] See Tula Connell, "70 migrant workers fled abuse in South Africa", 22 January 2016. Available from www.solidaritycenter.org/70-migrant-farm-workers-fled-abuse-in-south-africa/.

[33] See Tula Connell, "Zimbabwe migrant farm workers see dawn of justice", 18 May 2016. Available from www.solidaritycenter.org/zimbabwe-migrant-farm-workers-win-court-case/.

[34] See Richard Marosi, "Desperate workers on a Mexican mega-farm: 'they treated us like slaves'", *Los Angeles Times*, 10 December 2014. Available from http://graphics.latimes.com/product-of-mexico-labor/.

## B. Women workers[35]

34. Today only about half of women globally are in the labour force, compared to more than three-quarters of men.[36] Three-quarters of their employment is in informal and unprotected work. That makes women far less likely than men to be in trade unions and enjoy work-related protections, including assembly and association rights.

35. Discrimination, abuse and relegation to jobs at the bottom of the global economy undermine women workers' ability to join and form organizations that defend their interests. Worldwide, women's employment is concentrated in low-wage work at the far reaches of the global supply chain where social protections, including those afforded by labour law, are scarce.

36. The global gender wage gap, currently estimated at 77 per cent,[37] is a further indicator of discrimination against women workers. Gender-based job restrictions enshrined in law, in contravention of international conventions and standards, further depress women's wages and lower their employment rate, generating long-lasting economic and social consequences for themselves, their family and their country.[38] A World Bank survey of 173 countries found that 155 have at least one law impeding women's economic opportunities.[39] Legal restrictions on the type of employment women can access still exist in 79 countries.[40]

37. Hiring practices also give employers free reign to channel women into low-wage, low-status jobs.[41] Women may be concentrated on the global economy's most unprotected positions owing to many employers' belief that women workers are more docile, dexterous or uncomplaining, and will make fewer demands.[42]

38. Gender inequality in the family colludes with discrimination at work to further depress women's worker and human rights. For example, the disproportionate burden of household work falls to women across cultures,[43] curtailing their mobility and limiting their employment opportunities. Shouldering the burden of unpaid care disenfranchises women and distances them from their rights to association at work because it forces women into part-time, on-call, at-home or underpaid care labour to

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[35] For more on the issues facing women in the workplace, see A/HRC/26/39.

[36] See United Nations Entity for Gender Equality and the Empowerment of Women, *Progress of the World's Women 2015-2016: Transforming Economies, Realizing Rights* (New York, 2015), p. 74.

[37] See International Labour Organization, "ILO: large gender gaps remain across broad spectrum of global labour market", 8 March 2016. Available from www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_457267/lang--en/index.htm.

[38] See Arancha González, "In 155 countries women still face legal discrimination. The consequences are huge", *The Guardian*, 3 December 2015. Available from https://www.theguardian.com/global-development-professionals-network/2015/dec/03/women-legal-discrimination-worldwide-consequences.

[39] Ibid.

[40] See World Bank, *Women Business and the Law 2014: Removing Restrictions to Enhance Gender Equality — Key Findings* (Washington, D.C., 2013).

[41] See Radhika Balakrishnan, Lisa McGowan and Cassandra Waters, "Transforming women's work: policies for an inclusive economic agenda", (American Federation of Labour and Congress of Industrial Organizations, Solidarity Center and Rutgers University, 2016), p. 5.

[42] Ibid.

[43] Ibid.

enable them to continue their unpaid work.[44] That often forces women into the informal, unprotected economy. Women generally work those jobs over longer lifespans than men, without job-related social protections, which exacts a heavy toll[45] that includes entrenched impoverishment.

39. Perhaps the fiercest deterrent to the exercise of the rights to freedom of peaceful assembly and of association for women is gender-based violence, which affects more than 35 per cent of women globally.[46] While violence against women generally is increasingly in the global spotlight, its occurrence at work continues to be neglected or ignored.

40. Gender-based violence at work pervades[47] employment in the formal and informal economy,[48] and often intersects with other discrimination and exploitation, particularly based on race, ethnicity, country of origin and age. Gender-based violence at work includes physical abuse; attempted murder and murder; sexual violence; verbal abuse and threats; bullying; psychological abuse and intimidation; sexual harassment; economic and financial abuse; stalking; and more.

41. A recent survey in European Union countries found that 75 per cent of women in management and higher professional positions and 61 per cent of women in the service sector have experienced some form of sexual harassment.[49] Women workers in countries as diverse as Bangladesh, Cambodia,[50] the Dominican Republic,[51] Haiti,[52] Jordan, Swaziland[53] and Tunisia[50] have reported verbal, physical or sexual abuse, sexual harassment or rape at work. Some 90 per cent of female Kenyan tea and export-processing workers say they have witnessed or experienced sexual abuse at work; nearly all said they were afraid to report it for fear of losing their job.[54]

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[44] Ibid.

[45] Ibid.

[46] See World Health Organization, "Violence against women: intimate partner and sexual violence against women — fact sheet", available from www.who.int/mediacentre/factsheets/fs239/en/.

[47] Lisa McGowan, "Gender-based violence at work", Solidarity Center (forthcoming).

[48] Ibid.

[49] See European Union Agency for Fundamental Rights, *Violence against Women: An EU-Wide Survey — Main Results* (Luxembourg, Publications Office of the European Union, 2014).

[50] See Megane Ghorbani, "Informal work in Tunisia: a factor to be included in strategies addressing gender-based violence", 20 June 2014. Available from www.awid.org/news-and-analysis/informal-work-tunisia-factor-be-included-strategies-addressing-gender-based.

[51] See www.laborrights.org/publications/sexual-harassment-export-processing-zones-dominican-republic; Lourdes Pantaleón, "Sexual harassment in the export processing zones of the Dominican Republic", May 2003. Available from http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1484&context=globaldocs.

[52] See International Labour Organization and International Finance Corporation, *Better Work Haiti: Garment Industry 12th Biannual Synthesis Report Under the HOPE II Legislation* (Geneva, 2016).

[53] See All Africa, "Swaziland: Swazi textile workers exploited", 1 November 2014. Available from http://allafrica.com/stories/201411031316.html.

[54] See Regina G. M. Karega, "Violence against women in the workplace in Kenya: assessment of workplace sexual harassment in the commercial agricultural and textile manufacturing sectors in Kenya", May 2002. Available from www.laborrights.org/sites/default/files/publications-and-resources/Kenya.pdf.

42. Women union leaders in Guatemala are "especially targeted"[55] with threats, violence and murder. Women workers report being punched to force miscarriages, or abducted while waiting for transportation to and from work.[56] In Guatemala, more than 5,000 women and girls were killed between 2008 and 2015.[57] The Government of Guatemala has adopted a law against femicide, but rather than use the law to punish and pursue those responsible, it is often used to attack union leaders.[55]

43. Without the ability to organize and take collective action at work, too many of the world's working women are forced to labour in climates of violence and fear. The ever-present threat of the loss of employment, health, opportunities to provide for one's family and, potentially, one's life, exacerbates the challenge for workers to defend their basic rights to freedom of peaceful assembly and association.

44. Gender-based violence at work is a critical human rights violation that prevents the exercise of rights, including the freedoms of peaceful assembly and of association. Yet, despite its prevalence and corrosive impact, not a single binding international standard addresses the issue.

## C. Domestic workers

45. Situated at the intersections of gender, race, migration and informality, domestic workers represent a large component of the global workforce excluded from the rights to freedom of peaceful assembly and to association. ILO estimates that 67 million people globally are domestic workers, and 80 per cent of them are women;[58] and that 11.5 million migrant workers are domestic workers, about three-quarters of them women.[23]

46. Many countries do not recognize domestic labourers as "workers" under the law,[59] meaning that they have little ability to exercise their assembly and association rights at work. Roughly 90 per cent of domestic workers lack effective social protections, leaving them and their families in economically and socially vulnerable situations.[28]

47. Migrant domestic workers are, like other migrants, often unprotected by worker rights. They are subject to extreme abuses, including forced labour and trafficking and gender-based violence. They may be deprived of food and sleep,

[55] See Callum McSorley, "Guatemala: the world's most dangerous place for trade unions", *International Network of Street Papers*, 28 October 2013. Available from www.streetnewsservice.org/news/2013/october/feed-400/guatemala-the-world%E2%80%99s-most-dangerous-place-for-trade-unions.aspx.

[56] Ibid.

[57] See Mimi Yagoub, "Why does Latin America have the world's highest female murder rates?", 11 February 2016. Available from www.insightcrime.org/news-analysis/why-does-latin-america-have-the-world-s-highest-female-murder-rates.

[58] See International Labour Organization, "Decent work for domestic workers: achievements since the adoption of C189", briefing note. Available from www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/briefingnote/wcms_490778.pdf.

[59] See International Domestic Workers Federation website, available from www.idwfed.org/en.

denied medical treatment and prohibited from leaving their workplace.[60] Zainab Yusuf, a Kenyan worker trafficked to Saudi Arabia, had to work 21 hours a day cleaning and caring for her employers' seven children. She could not leave the house or contact her family, and faced ongoing sexual harassment and physical abuse from her employer and his sons.[61] Under such conditions, domestic workers have no opportunity to peacefully assemble or to associate.

48. Paid domestic work is the quintessential precarious work.[62] Examples of laws that differentiate domestic workers from other workers abound. The United Kingdom excludes domestic workers from limits on hours of work, minimum wage and health and safety provisions. Canada, Finland Japan and Switzerland similarly exclude domestic workers from minimum wage legislation.[63]

49. Many countries, including the United Kingdom and France, exclude domestic workers from the jurisdiction of labour inspectorates in deference to employers' privacy.[64] Canada (Ontario), Ethiopia and Jordan exempt domestic workers from laws covering trade union representation.[65] Migration law often also treats domestic workers differently from other workers.[66] The Special Rapporteur notes, however, as a positive step, that 30 countries have now extended labour protection to domestic workers.[58]

# IV. International legal framework

## A. International and regional human rights instruments

50. The rights to freedom of peaceful assembly and of association are recognized in numerous international instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

51. The International Covenant on Civil and Political Rights provides that States must respect assembly and association rights and ensure that all people within their territory and jurisdiction enjoy them, without distinction of any kind, through law, the provision of remedies and effective enforcement.[67] States must also refrain from

[60] Presentation by Teresa Wabuko, Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers Union, at the United Nations expert consultation on freedom of assembly and association, 5 May 2016.

[61] Presentation by Zainab Yusuf, Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers Union, at the United Nations expert consultation on freedom of assembly and association, 5 May 2016.

[62] See Virginia Mantouvalou, "Human Rights for precarious workers: the legislative precariousness of domestic labour", Labour Rights Institute Online Working Papers, 2/2012. Available from www.ucl.ac.uk/laws/lri/papers/VM%20precarious%20workers.pdf.

[63] Ibid.

[64] Ibid.

[65] Ibid.

[66] Ibid.

[67] See International Covenant on Civil and Political Rights, arts. 2 (2) and 2 (3) (a-c).

violating rights recognized by the Covenant, and are accountable for violations of those rights when the infringement occurs as a result of its failure to secure the right in domestic law and practice. The desire to maximize economic profit or create attractive investment climates does not lower the obligations and responsibilities of the State. The Covenant also obliges States to combat discrimination by private actors,[68] including in employment.[69]

52. The principle of non-discrimination applies to all rights, and States are obliged to ensure that traditionally disenfranchised groups are able to enjoy their rights to freedom of peaceful assembly and of association. Article 4 of the Convention on the Elimination of All Forms of Discrimination against Women requires States to take positive measures to secure equal enjoyment of rights for women, including assembly and association rights. The Committee on Migrant Workers[70] requires States to encourage self-organization among migrant workers irrespective of their migration status, and to inform them about associations that can provide assistance.

53. The International Covenant on Economic, Social and Cultural Rights requires that States ensure that people can organize and join workers' associations that address their concerns, and that particular attention be given to domestic workers, rural women workers, women working in female-dominated industries and women working at home, who are often deprived of that right.[71]

54. Both trade unions and the right to strike are fundamental tools to achieving workers' rights, as they provide mechanisms through which workers can stand up for their interests collectively, and engage with big business and government on a more equal footing. The State is obligated to protect these rights for all workers.

55. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights both explicitly protect the right to form and join trade unions. International human rights law also imposes upon States a duty to actively promote, encourage and facilitate the enjoyment of fundamental rights, including labour rights (A/70/266, para. 4). Further, the notion that States should promote trade unionism among workers is implicit in the International Covenant on Economic, Social and Cultural Rights. States must take measures to ensure that third parties do not interfere with union rights.

[68] Ibid., arts. 2 and 26.

[69] Human Rights Committee, *Franz Nahlik v. Austria*, decision on communication No. 608/1995, 22 July 1996 (CCPR/C/57/D/608/1995).

[70] Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, general comment No. 2, 28 August 2013 (CMW/C/GC/2).

[71] See Committee on Economic, Social and Cultural Rights, general comment No. 23 (2016) on the right to just and favourable conditions of work (E/C.12/GC/23).

56. The right to strike has been established in international law for decades, in global and regional instruments, and is also enshrined in the constitutions of at least 90 countries.[72] The right to strike has, in fact, become customary international law.[73]

### 1. Instruments of the International Labour Organization

57. ILO, as the only global tripartite institution, plays a unique role in setting standards on fundamental principles and rights at work. Core ILO labour conventions include the Freedom of Association and Protection of the Right to Organize, 1948 (No. 87), which calls on States to prevent discrimination against trade unions, protect employers' and workers' organizations against mutual interference and promote collective bargaining; and the Right to Organize and Collective Bargaining Convention, 1949 (No. 98), which protects workers who are exercising their right to organize, upholds the principle of non-interference between workers' and employers' organizations and promotes voluntary collective bargaining. These foundational rights are essential to the protection of other core labour rights. ILO signatory States are obliged to respect principles of freedom of association whether or not they have ratified the appropriate conventions.[74] The ILO Decent Work Agenda calls on countries to respect core conventions, provide for social protection, create decent jobs and engage in genuine social (tripartite) dialogue. Also of relevance, the ILO Domestic Workers Convention, 2011 (No. 189) sets standards for the effective promotion and protection of domestic workers' human rights.

### 2. States' obligations to respect, protect and fulfil the rights to freedom of peaceful assembly and association

*Respect*

58. States have the primary role in preventing or halting violations of workers' rights to freedom of peaceful assembly and of association, with clear obligations to protect, promote, facilitate and fulfil those rights, even in the global economy. Yet workers' ability to exercise their rights is in precipitous decline. Many States place obstacles, both in law and practice, that restrict workers' rights or fail to enforce

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[72] See, for example, Clarence Wilfred Jenks, *The International Protection of Trade Union Freedom*, The Library of World Affairs, No. 35 (New York, Frederick A. Praeger, 1957), pp. 561-562; Paul O'Higgins, "International standards and British labour law", in Roy Lewis, *Labour Law in Britain* (Oxford, United Kingdom, Oxfordshire, 1986), p. 577; Breen Creighton, "The ILO and protection of freedom of association in the United Kingdom", in Keith D. Ewing, Conor A. Gearty and Bob A. Hepple, eds., *Human Rights and Labour Law: Essays for Paul O'Higgins* (New York, Mansell,1994), p. 2; ILO, *International Labour Standards: A Workers' Education Manual*, 3rd rev. ed. (Geneva, 1990), p. 106.

[73] See, for example, ILO Convention No. 87 of 1948, arts. 3, 8 and 10; International Covenant on Economic, Social and Cultural Rights of 1966, art. 8; International Covenant on Civil and Political Rights of 1966, art. 22; European Convention on Human Rights of 1950, art. 11; American Convention on Human Rights of 1969, art. 16.

[74] International Labour Organization, *ILO Declaration on Fundamental Principles and Rights at Work* (Geneva, 1998). Available from www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm.

laws protecting those rights. The International Trade Union Confederation found that 50 of 141 countries surveyed had such restrictions.[75]

59. Some States have outright bans on all legitimate unions, including Saudi Arabia and the United Arab Emirates.[76] Other States, such as Qatar,[77] impose impermissibly broad restrictions, such as prohibiting public-sector employees from joining trade unions or participating in collective bargaining or strikes. Some laws restrict bargaining subjects, including wages, which hampers assembly and association rights, as workers are more reluctant to risk organizing when potential gains are so few.[78] States, such as China, that own or operate enterprises and do not permit the formation of independent unions violate association and assembly rights both as a government and employer (see E/C.12/CHN/CO/2, para. 23).

60. "Legislative precariousness" regarding the freedoms of association and of peaceful assembly is widespread globally, as is the lack of policy harmony surrounding it. States frequently pass laws that are not fully protective of assembly and association rights, explicitly restrict rights and exclude certain groups or limit certain components of rights. For example, in India, where tens of millions of workers are in the informal economy, the Government is working to increase the flexibility of labour laws to make it easier for employers to fire workers.[79]

61. When two pieces of legislation conflict, the gaps between them may provide an opportunity for rights violations to occur. States have an obligation to maintain clear and consistent standards in favour of assembly and association rights for all workers, across all laws, policies and practices. In the Philippines, the lack of policy coherence at the national level has resulted in conflicting policies on the rights to freedom of peaceful assembly and of association for public-sector workers. The executive order governing public-sector unions recognizes the right to collective bargaining agreements, but the Department of Budget Management imposes limits and budgetary restrictions, effectively undermining the right to negotiate in the public sector.[80]

62. Some States have used more general laws to restrict workers' assembly and association rights. In India, for example, the government of Karnataka used section 144 of the Criminal Procedure Code, which prohibits assemblies of more than

[75] See International Trade Union Confederation, "ITUC global rights index: the world's worst countries for workers" (Brussels, 2016). Available from www.ituc-csi.org/IMG/pdf/survey_ra_2016_eng.pdf.

[76] See International Trade Union Confederation, "Internationally recognized core labour standards in Saudi Arabia", report for the World Trade Organization (WTO) General Council review of the trade policies of Saudi Arabia, Geneva, 25 and 27 January 2012. Available from www.ituc-csi.org/internationally-recognised-core,10469, and "International recognized core labour standards in the United Arab Emirates", report for the WTO General Council review of the trade policies of the United Arab Emirates, Geneva, 27 and 29 March 2012. Available from www.ituc-csi.org/internationally-recognised-core,10867.

[77] International Labour Organization, case No. 2988 (Qatar), complaint date 28 September 2012. Available from www.ilo.org/dyn/normlex/en/f?p=1000:50001:0::NO::P50001_COMPLAINT_FILE_ID:3079678:NO.

[78] Submission from Public Services Labour Independent Confederation, Philippines.

[79] Stratfor, "The difficulties of retooling the Indian economy", 20 July 2016. Available from https://www.stratfor.com/analysis/difficulties-retooling-indian-economy.

[80] Submission from Public Services Labour Independent Confederation, Philippines.

10 people, to stop protests by garment workers in Bengaluru in April 2016.[81] The Constitution of Zimbabwe protects assembly and association rights, but they are compromised by other criminal laws that punish acts and opinions detrimental to public order with up to five years in prison. The laws have been used to repress trade union and civil society freedom of association rights.[82] Similarly, in Swaziland, labour federation criticism of the Government resulted in the federation's deregistration.[83]

63. States that discriminate or exclude certain groups from protective legislation violate their obligations to respect and protect these rights, as well as the basic principle that these rights should be enjoyed by everyone equally. Authorities may not discriminate against any group or individual on grounds such as gender, immigration or residency status, language, social opinion, race, religion or sexual orientation. Enforcement of migration laws cannot take priority over respect for human rights law.

64. Racial discrimination can prevent workers from exercising their peaceful assembly and association rights, as in Colombia, where approximately 75 per cent of the workforce in Colombia's ports, primarily Afro-descendant workers, are employed under flexible contracts and not allowed to join unions or to bargain. Many of the thousands of trade unionists[84] in Colombia murdered between 1986 and 2011 were Afro-Colombian.[85]

65. In addition, States that use or allow the use of precarious and informal labour to avoid legal employment obligations, such as minimum wage rates and benefits (and often to avoid unionization), are failing to respect workers' assembly and association rights. Peru, for example, is increasingly using short-term contracts in the public sector.[86] Cambodia's new trade union law excludes informal workers, civil servants, teachers and domestic workers from its scope.[87] Also, the Republic of Georgia uses short-term contracts for many State and municipal employees and refuses to apply provisions of the labour code that require long-term or open-end employment contracts.[88]

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[81] Submission by Youth for Unity and Voluntary Action, India.

[82] See www.ituc-csi.org/IMG/pdf/survey_ra_2013_eng_final.pdf.

[83] See International Trade Union Confederation, "New ITUC report on violations of trade union rights", 12 June 2013. Available from www.ituc-csi.org/new-ituc-report-on-violations-of.

[84] See Verdad Abierta, "Estadísticas Defensores de derechos humanos, sindicalistas, docentes y periodistas". Available from www.verdadabierta.com/cifras/3831-estadisticas-de-sindicatos-docentes-y-periodistas-.

[85] See Tula Connell, "Afro-Colombians fighting against discrimination at work", 12 March 2013. Available from www.solidaritycenter.org/afro-colombians-fighting-against-discrimination-at-work/.

[86] See Lucien O. Chauvin, "Peru submits Pacific trade pact to congress for approval", *Bloomberg Bureau of News Affairs*, 21 July 2016. Available from www.bna.com/peru-submits-pacific-n73[illegible]5176/.

[87] See Mong Palatino, "The trouble with Cambodia's new law on trade unions", *The Diplomat*, 18 April 2016. Available from http://thediplomat.com/2016/04/the-trouble-with-cambodias-new-law-on-trade-unions/.

[88] Solidarity Center, e-mail interview with Gocha Alexsandria, Project Director for the Solidarity Center's project on labour inspection in Georgia, 16 August 2016.

66. State restrictions on assembly and association rights, including the right to strike, frequently exceed parameters set by ILO Convention 87 and decades of case law. In countries where the right to strike is not legally prohibited, Governments attempt to justify restrictions in the name of public order, public security, the threat of terrorism, national interest or economic crisis.[89]

67. Restrictions often used include exclusion of categories of workers from the right to strike; excessive prerequisites required to hold a legal strike; inappropriate legal changes that allow public authorities to suspend or declare a strike illegal; and government and public arguments favouring restrictions on the right to strike.[90] Onerous requirements or excessive restrictions can make it almost impossible to conduct a legal strike, thereby removing one of the tools of last recourse for workers trying to bring unwilling employers to the bargaining table. Such restrictions constitute a violation of workers' rights to freedom of assembly and of association.

68. States are obliged to respect the rights to freedom of peaceful assembly and of association by refraining from interfering, directly or indirectly, with their exercise. Under international law, restrictions on the rights to peaceful assembly and to association and to form or join a trade union are permissible only where prescribed by law and as necessary in a democratic society in the furtherance of the legitimate interests enumerated in those instruments.[91] International law foresees the possibility of States restricting members of armed forces and police from exercising the right to freedom of association, and allows for States to restrict the right to strike for essential services and civil servants engaged in the administration of the State.[92] However, as with all restrictions, these should be the exception rather than the rule.

69. In many countries where rights to freedom of peaceful assembly and of association are constitutionalized, such as Bahrain, strikes are intentionally impeded. Some 92 countries exclude specific categories of workers from striking.[93] The law in India allows the Government to ban strikes in Government-owned enterprises. In Kazakhstan, workers in entities that provide "vital activities" (public transport, utilities and communications) may strike only if the "necessary range of services is provided based on a prior agreement with the local executive authorities".[94]

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[89] See Edlira Xhafa, *The Right to Strike Struck Down? A Global Survey of Recent Trends*, FES Briefing (Berlin, Friedrich Ebert Stiftung, May 2016), p. 2. Available from www.fes.de/gewerkschaften/common/pdf/2016_FES_Briefing_Right_to_Strike.pdf.

[90] Ibid., pp. 2 and 3.

[91] See International Covenant on Civil and Political Rights of 1966, art. 22(2), and International Covenant on Economic, Social and Cultural Rights of 1966, art. 8(1)(a).

[92] See Organization for Security and Cooperation in Europe, "Venice Commission guidelines on freedom of peaceful assembly", 2nd ed., 9 July 2010. Available from www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)020-e.

[93] See International Trade Union Confederation, "ITUC global rights index: workers' rights weakened in most regions, worst year on record for attacks on free speech and democracy", 9 June 2016. Available from www.ituc-csi.org/ituc-global-rights-index-workers.

[94] International Labour Organization, "Memorandum of technical comments on the draft law on trade unions of Kazakhstan", June 2013, p. 5. See also Kazakhstan, Labour Code of 1 January 2016, art. 172 (2).

70. The Government of Egypt has shut down civic space, banning virtually all strikes and protests, and is cracking down on journalists and their union.[95] On 1 May 2016, police prevented hundreds of workers from meeting at the union building to commemorate International Workers' Day.[96]

71. On 14 November 2015, at a rally in the Republic of Korea, 20,000 police used tear gas and water cannons to disperse a protest attended by 100,000 demonstrators. Dozens were injured, and criminal proceedings were brought against 585 leaders and members of the Korea Confederation of Trade Unions. The Confederation president was sentenced to five years in prison (A/HRC/32/36, para. 41). The Special Rapporteur emphasizes again that charging peaceful assembly participants with criminal offenses violates the right to peaceful assembly.

72. The Special Rapporteur welcomes the fact that in Slovenia anyone has the freedom to join a trade union, and that a trade union of migrant workers was established and gained legal personality in February 2016.[97]

*Protect*

73. States are obligated to protect workers' peaceful assembly and association rights from interference by non-State actors, such as private-sector employers and enterprises. That includes an obligation to take steps to prevent, punish and provide redress abuses through effective law, policies and adjudication. The implementation of the norms is as significant as the norms themselves.

74. States with authoritarian governments may allow or encourage the establishment and the operation of State-sponsored workers associations and unions, with the aim of preventing the emergence of independent voices. China limits workers' rights to form labour associations and to elect their preferred union representation by giving monopolistic status to the All-China Federation of Trade Unions, which suppresses worker organizing.[98] Government-aligned union federations in Egypt (see E/C.12/EGY/CO/2-4, para. 13), the Russian Federation[99] and Viet Nam (see E/C.12/VNM/CO/2-4, para. 21) thwart workers' attempts to form independent unions, rarely represent worker interests, often sign weak collective bargaining agreements (without worker input) and actively prevent workers from exercising their assembly and association rights.

75. Other States generally fail to protect workers against employer violations or to enforce their own laws. In fact, many do not stop at benign neglect, but support or collude with employers to infringe upon workers' rights to peaceful assembly and to association. In the United States, Tennessee State officials reportedly offered nearly

[95] See http://anhri.net/?p=151666&lang=en.

[96] See "Egyptian journalists protest against arrests after 'raid' on union", *The Guardian*, 2 May 2016. Available from https://www.theguardian.com/world/2016/may/02/egyptian-journalists-protest-arrests-cairo.

[97] Submission from the Government of Slovenia.

[98] Samuel Li Shing Hong, "Freedom of association and assembly in the private sector for vulnerable workers in a global economy — from the Asian perspective", Asia Monitor Resource Centre, presented at United Nations expert consultation on freedom of assembly and association, 6 May 2016, p. 2.

[99] See https://www.gwu.edu/~iereesgwu/assets/docs/demokratizatsiya%20archive/10-2_Crowley.PDF, pp. 238-239.

$300 million in incentives to Volkswagen for adding a production line to a factory, but the offer was contingent on the plant remaining non-unionized (A/HRC/32/36, para. 38). In the State of Georgia in the United States, police called in by the company prevented union organizers from distributing leaflets outside the company's gates, and issued a citation that carried the comment: "picketing drivers to become union".[100] The State government of Mississippi touts the lack of unionization as a great benefit when courting potential employers. The dangers of that are exemplified by the situation at the Nissan plant in Canton, where the company has aggressively worked to prevent unions from organizing. During his official visit to the United States in July 2016, the Special Rapporteur was informed that Nissan operates 44 major plants throughout the world; all of them are unionized, except for two of them in the south of the United States.[26]

76. Violence against workers is both a reason for and a consequence of the global weakening of workers' rights to freedom of peaceful assembly and of association. In 2015, unionists were murdered in 11 countries for their activism: Chile, Colombia, Egypt, El Salvador, Guatemala, Honduras, Islamic Republic of Iran, Mexico, Peru, South Africa and Turkey.[74] Honduras has seen a plague of violence, with 31 trade unionists, 57 rural workers and 28 journalists murdered between 2009 and early 2014, while 62 trade unionists have been assassinated in Guatemala since 2008.[101] This violence is generally delivered with impunity and serves as a terrifying deterrent to workers' exercise of rights of freedom of peaceful assembly and of association.

77. At times State authorities actually bolster employers' efforts to restrict workers' peaceful assembly and association rights. In 2013, in Algeria, police violently dispersed a peaceful protest of the Contractual Workers Union at a Government compound, and arrested 20 people.[102] In Nigeria, on 19 May 2016, police beat, tear-gassed and arrested members of the Nigerian Labour Congress who were peacefully demonstrating, claiming that workers had not obtained police clearance to hold the protest.[103] The Special Rapporteur stresses that the right to peaceful assembly is fundamental; its exercise does not require the permission of the State (A/HRC/32/36/Add.1, para. 17).

78. Indonesian law states that unions have the right to strike, but police often pressure workers to end legal strikes and protests through violence or arrests. For example, 23 labour activists and 2 public defenders were arrested when several union federations protested Government Regulation on Remuneration No. 78/2015. In 2014, 17 workers in West Java were injured in an organized attack; police

[100] See Dave Jamieson, "Watch what happens when you try to unionize some truck drivers in the south", *Huffington Post*, 7 August 2016. Available from www.huffingtonpost.com/entry/unionizing-in-the-south-video_us_57893980e4b0867123e13a29.

[101] See Tula Connell, "Central American trade unionists increasingly targeted", 3 February 2014. Available from www.solidaritycenter.org/central-american-trade-unionists-increasingly-targeted/.

[102] See ConstitutionNet, "Algeria: crackdown on independent trade unions, unionists prosecuted, imprisoned for peaceful activities", 7 October 2013. Available from www.constitutionnet.org/news/algeria-crackdown-independent-trade-unions-unionists-prosecuted-imprisoned-peaceful-activities.

[103] See Cholo Brooks, "Nigerian policemen beat up labour members on peaceful protest in Ebonyi state", *Global News Network Liberia*, 19 May 2016. Available from http://gnnliberia.com/2016/05/19/nigerian-policemen-beat-labour-members-peaceful-protest-ebonyi-state/.

watched but did not stop the violence. The incident has had a chilling effect on unionization and workers' exercise of their rights.[104] The role of the military and police in monitoring and providing security services at factories has had a similar effect.[105]

79. Attempts to erode the right to strike take place both at the multilateral and national levels. In 2012, the ILO Employers' Group began arguing that the right to strike, protected by Convention 87, did not exist at all. Subsequent court decisions have dismissed employers' claims.[106] The Special Rapporteur notes the positive role played by the Government Group in upholding workers' right to strike by recognizing that "without protecting a right to strike, freedom of association, in particular the right to organize activities for the purpose of promoting and protecting workers' interests, cannot be fully realized."[107]

*Fulfil*

80. International human rights law imposes on States the responsibility to take positive measures to ensure the exercise of rights. This means that States cannot take action to undermine rights, and that they cannot maintain a "neutral" or "hands-off" approach in response to third party actions that undermine these rights (A/HRC/32/36/Add.2, para. 68).

81. Access to effective remedies is a key issue for workers, who often lack legal recourse for rights violations. Workers in vulnerable situations may find it especially difficult to assert their rights because of structural impediments, including lack of access to labour inspectorates that often do not operate in informal and private work places; collaboration between immigration and police officials that prioritizes investigating migration status over employers' violations of rights; and restrictions that make migrant workers "unfree labour", preventing them from circulating in host countries.

82. Even migrant workers who have formal access to inspectors are reluctant to report violations for fear of deportation. In addition, migrants often have no legal rights or access to temporary accommodations to remain in country during legal procedures, thus preventing reporting and participation in legal proceedings. The lack of written contracts in the informal work environment renders it difficult to prove employment.

83. States are obligated under international law to establish accessible and effective complaint mechanisms that can promptly investigate allegations of abuses related to the rights to freedom of peaceful assembly and of association (see A/HRC/20/27, p. 19). Where those rights have been unduly restricted, victims have the right to obtain redress, including adequate compensation and sanctions against the employer (ibid.).[72] Effective remedies should be available from a range of

[104] Submission from the Federation of Indonesian Labour Struggle.

[105] Ibid.

[106] See IndustriAll Global Union, "Right to strike upheld at ILO", 26 February 2015. Available from www.industriall-union.org/right-to-strike-upheld-at-ilo.

[107] International Labour Organization, document TMFAPROC/2015/2. Available from www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_346764.pdf.

mechanisms, including judicial and non-judicial and administrative institutions, such courts, ombudsperson offices and national human rights institutions.

84. Encouraging examples of court engagement include the case of a young Togolese domestic worker held in forced labour, where the court found that the State had a duty to criminalize grave labour exploitation by private entities.[108] In Norway, workers can take legal action in court when their rights are violated. Access to court is free and free legal aid is available to those below a certain income threshold. At Service Centres for Foreign Workers, relevant government departments work together to inform foreign nationals arriving in Norway for employment of their rights and help them to promptly process their applications.[109]

### 3. Role of other transnational actors and factors

85. Governments and employers are not the only entities that influence workers' ability to exercise their peaceful assembly and association rights. Multilateral financial institutions may condition government loans on measures that weaken labour protections, deny workers a voice in the process and move employment towards informality. Recent International Monetary Fund loans to Romania and Greece[110] were conditioned on limiting or denying workers' rights and benefits. Meanwhile, the same financial institutions fail to enforce their own labour standards, as in Uzbekistan, where the World Bank-funded projects that benefit the Government's cotton sector are plagued by State-sponsored forced labour.[111] The Special Rapporteur notes that the World Bank recently adopted a new environmental and social framework that specifies that workers' rights must be respected in Bank-financed projects. He is concerned, however, that the labour safeguards do not reference international human rights standards and, as such, may be weakened by national laws.[112]

86. Today's trade and investment agreements regulate broad aspects of international economic and social relations, many of which affect human rights. In recent years, trade agreements negotiated by Canada, the European Union and the United States incorporated labour provisions to address worker rights failings. Although trade agreements have helped encourage some countries, such as

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[108] See James A. Gross and Lance Compa, eds., *Human Rights in Labour and Employment Relations: International and Domestic Perspectives* (Ithaca, New York, Cornell University Press, 2009), p. 166.

[109] Submission from the Government of Norway.

[110] See International Trade Union Confederation, "IMF should stop attacks against pensions and workers' rights in Greece", 27 May 2015. Available from www.ituc-csi.org/imf-should-stop-attacks-against.

[111] See "Defending Human Rights in Development"; press release issued 14 July 2016 by the International Corporate Accountability Roundtable.

[112] See World Bank, "World Bank board approves new environmental and social framework", press release, 4 August 2016. Available from www.worldbank.org/en/news/press-release/2016/08/04/world-bank-board-approves-new-environmental-and-social-framework; see also International Trade Union Confederation, "World Bank should uphold ILO standards in new labour safeguard", 25 July 2016. Available from www.ituc-csi.org/world-bank-should-uphold-ilo.

Bahrain,[113] Oman and Peru[114] (signatories to bilateral trade agreements with the United States), to undertake legal reforms prior to ratification, they have not addressed changes required to guarantee full freedom of peaceful assembly and association, and provisions have been poorly enforced.

87. For example, despite well-documented, systematic and decades-long violations of freedom of association in Colombia, the United States signed a free trade agreement with the country in 2012. Four years later, unions, frustrated by lax enforcement and lack of political will, filed a trade complaint[115] charging widespread and ongoing violations of freedom of association in the petroleum and sugar cane sectors. Canadian unions have filed a similar complaint[116] under their country's bilateral trade agreement with Colombia.

88. Labour, environmental and human rights groups report that the Trans-Pacific Partnership Free Trade Agreement, signed by the United States and 11 Pacific Rim countries on 4 February 2016, not yet in force, was negotiated non-transparently and that its backers were primarily business lobbies.[117] Critics point out that it fails to improve on the inadequate labour rights commitments of previous agreements,[26] and extends benefits to countries like Viet Nam and Brunei, which limit political rights, civil liberties and freedom of association, and ban independent unions. Mexico is also a beneficiary, despite its record of permitting "illegitimate collective bargaining agreements (commonly known as 'protection contracts')" signed "between an employer and an employer-dominated union".[118]

89. The Special Rapporteur has previously highlighted the Trans-Pacific Partnership Free Trade Agreement's clear bias favouring the economic interests of businesses over the freedom of assembly and association rights of non-investors, giving corporations the right to challenge laws and policies that harm their investments,[119] while not affording civil society groups equal treatment (A/HRC/32/36, para. 39). The Special Rapporteur believes that the labour provisions in trade agreements are incapable of delivering sustainable improvements

[113] See Jeffrey S. Vogt, "The evolution of labour rights and trade: a transatlantic comparison and lessons for the transatlantic trade and investment partnership", *Journal of International Economic Law*, vol. 18, No. 4 (2015), pp. 18 and 838-841.

[114] Ibid., pp. 18, 837-838.

[115] See American Federation of Labour and Congress of Industrial Organizations and others, "Public submission to the Office of Trade and Labour Affairs under chapters 17 (labour) and 21 (dispute settlement) of the Colombia-United States Trade Promotion Agreement", 2016. Available from https://www.dol.gov/sites/default/files/documents/ilab/Colombia%20Final%20Word%20version%20%2800000002%29.pdf.

[116] See Canada, National Administrative Office, *Public Communication CAN 2016-1 (Colombia) — Accepted for Review*. Available from www.labour.gc.ca/eng/relations/international/agreements/colombia/2016-1.shtml.

[117] See John Nichols, "TPP prioritizes the 'rights' of corporations over workers, the environment and democracy", *The Nation*, 7 October 2015. Available from https://www.thenation.com/article/tpp-prioritizes-rights-of-corporations-over-workers-the-environment-and-democracy/; see also Fair Labour Association, "Protection contracts in Mexico", Issue Brief, March 2015. Available from www.fairlabor.org/report/protection-contracts-mexico.

[118] See Fair Labour Association, "Protection contracts in Mexico".

[119] See Trans-Pacific Partnership agreement of 4 February 2016, chap. 28. Available from https://ustr.gov/sites/default/files/TPP-Final-Text-Dispute-Settlement.pdf.

in the enabling environment for freedom of association for workers without binding enforcement mechanisms and a clear political commitment by signatory States.

90. The Special Rapporteur maintains that private multilateral bodies, such as the International Olympic Committee and the Federation Internationale de Football Association, have a responsibility to respect, if not promote, universally recognized human rights (A/69/365, para. 31). He regrets that those bodies have not taken advantage of their power and influence to press host countries of their events such as Brazil (Summer Olympics 2016) and Qatar (World Cup 2022) to uphold workers' rights, including assembly and association rights.

### 4. Corporate social responsibility and voluntary compliance initiatives

91. Corporate social responsibility and social auditing comprise a multimillion-dollar industry created by global businesses to monitor compliance with industry human rights standards across supply chains and at the enterprise level. Although those mechanisms have resulted in some anecdotal successes and benefited companies' public relations images, they have had little measurable impact on promoting assembly and association rights. Problems include their voluntary, non-binding nature; lack of consultation with workers and communities; audit results having little impact on business decision-making; and limited, pre-scheduled factory audits that frequently ignore freedom of association.[120] In Pakistan, for example, the Ali Enterprises garment factory was ravaged by fire, killing nearly 300 workers[121] only days after it had been audited and certified in 2012.

92. Nevertheless, the Special Rapporteur notes the positive impact that the Accord on Fire and Building Safety in Bangladesh[122] has had on improving garment workers' ability to exercise their assembly and association rights. Global brands, retailers and unions are signatories to the legally binding agreement, established in May 2013, giving garment workers a voice in improving their workplaces.

93. While there is space for corporate social responsibility initiatives, they are not a substitute for legally binding, robust enforcement of the rights to freedom of peaceful assembly and of association. Where private governance becomes the dominant means of monitoring and enforcing, already weak public inspection systems will continue to wither. Further, private mechanisms are usually incapable of providing effective remedies on a consistent basis. Recent studies on codes of conduct suggest that they can yield negative results for workers' welfare, for example in Indonesia, with similar trends in China, India and the Republic of Korea.[123] In that regard, the Special Rapporteur reiterates his support for an international human rights instrument that creates binding obligations for national and transnational corporations (A/HRC/29/25, para. 23).

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[120] See International Labour Organization, *Decent Work in Global Supply Chains*, paras. 135-139. Available from http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_468097.pdf.

[121] See www.cleanclothes.org/safety/ali-enterprises.

[122] See http://bangladeshaccord.org/about/.

[123] Sanjiv Pandita and Fahmi Panimbang, "Global supply chains: struggle within or against them?", in Shae Garwood, Sky Croeser and Christalla Yakinthou, eds., *Lessons for Social Change in the Global Economy: Voices from the Field* (Plymouth, United Kingdom, Lexington Books, 2013).

# V. Conclusions and recommendations

94. **The majority of the world's workers, particularly those in vulnerable situations, such as migrant, women and domestic workers, are disenfranchised of their rights to freedom of peaceful assembly and of association in the workplace. That disenfranchisement is the result of many factors, including the failure of much touted economic policies in reducing poverty and economic inequality; the increasing power of large multinational corporations and corresponding failure by States to effectively regulate and enforce norms and standards against those actors; the fragmentation of the workplace and diffusion of employer responsibilities across a range of actors; and the global crackdown on civil society that targets organizations and individuals working on labour issues.**

95. **Workers are entitled to the rights to freedom of peaceful assembly and of association regardless of their status within a country. Further, those rights are central to ensuring that workers can claim their rights to just and favourable conditions of work in the face of structural obstacles that keep them and their issues marginalized.**

96. **States have obligations under international human rights law to ensure that everyone within their jurisdiction is able to exercise his or her rights. Those obligations include refraining from violating workers' rights, taking positive measures to fulfil the rights and protecting against violations by third parties.**

97. **Despite that, States generally prioritize economic and corporate interests at the expense of workers' rights, a counterproductive approach that exacerbates poverty and inequality. This situation must be urgently addressed, both to allow people to exercise their rights and to ensure the viability of the world's economic system. In this spirit, the Special Rapporteur calls upon States, multilateral organizations, businesses and other stakeholders to commit themselves to creating the best possible enabling environment for the exercise of the rights to freedom of peaceful assembly and of association in the workplace. The Special Rapporteur proposes the following recommendations as steps towards realizing those goals.**

98. **The Special Rapporteur recommends that States:**

(i) **Adopt and implement all recommendations contained in his previous reports, recognizing that workers in vulnerable situations are more likely to experience violations of their rights than other groups;**

(ii) **Ratify all relevant international and regional human rights instruments that guarantee the rights to freedom of peaceful assembly and of association, as well as other rights for workers, including ILO Conventions 87 and 98;**

(iii) **Ensure that the rights to freedom of peaceful assembly and of association can be exercised in the workplace by everyone without discrimination on the basis of type of work, employment, workplace, enterprise**

**or sector, immigration status or other limitations contrary to international law and standards;**

**(iv) Ensure policy coherence through a review and revision of national laws and policies that may adversely impact the full exercise of the rights to freedom of assembly and association;**

**(v) Take appropriate measures, including affirmative measures, to ensure that workers in vulnerable situations have the ability to exercise effectively their assembly and association rights. Such measures should include:**

**(a) Improving guest worker programmes to, among other things, eliminate structural barriers, such as coercive conditions of work visas that provide the employer inordinate control over the lives of workers;**

**(b) Removing impediments to freedom of movement and access to justice (for example, provide temporary immigration status while rights violations are being investigated);**

**(c) Regulation of financial requirements that create debt and conditions for exploitation by third parties;**

**(d) Actively creating an enabling environment for workers to establish independent, voluntary associations, including trade unions;**

**(vi) Establish and adequately resource independent mechanisms to monitor the effective protection of assembly and association rights;**

**(vii) Prohibiting companies that fail to respect assembly and association rights from bidding on public contracts;**

**(viii) Ensuring the availability of effective judicial or other appropriate remedies for the violation of peaceful assembly and association rights that are available to all and are not subject to migration status;**

**(ix) Devoting particular attention to protecting and promoting the assembly and association rights of migrant workers, who by virtue of their immigration status may lack other mechanisms with which to advance their political, social and economic interests;**

**(x) Upholding the protection of workers' assembly and association rights in bilateral and multilateral trade and investment agreements, and consulting with civil society organizations, including trade unions, to the same extent as business entities in their engagement on such agreements;**

**(xi) Ensuring that non-State actors, particularly businesses, comply with international human rights norms and standards, and in particular the rights to freedom of peaceful assembly and of association. Regulation mechanisms should include due diligence processes, human rights impact assessments and mandatory disclosure regimes in respect of global supply chains.**

99. **The Special Rapporteur recommends that businesses (including employers, lead firms, subsidiaries, suppliers, franchisees or investors in supply chains):**

(i) **Meet their obligations to respect the rights to freedom of peaceful assembly and of association. That includes respecting the rights of all workers to form and join trade unions and labour associations and to engage in collective bargaining and other collective action, including the right to strike;**

(ii) **Refrain from anti-union policies and practices, and reprisals against workers who exercise their peaceful assembly and association rights;**

(iii) **Implement the Guiding Principles on Business and Human Rights by, among other things, making policy commitments to respect peaceful assembly and association rights and conducting due diligence in relation to human rights in respect of global supply chains.**

100. **The Special Rapporteur recommends that civil society, including trade unions:**

(i) **Create alliances across civil society to monitor the effective implementation of these recommendations;**

(ii) **Commit to the principle that labour rights are human rights, and recognize the urgent need for general human rights organizations to work on labour rights as a part of their core mandates, particularly in this era of weakening of workers' rights;**

(iii) **Trade unions specifically target outreach and advocacy at historically disenfranchised worker populations, including the full incorporation of domestic, migrant and informal workers into trade unions and bargain collective agreements;**

(iv) **Continue to advocate for equal opportunity to present their views in consultations with Governments and businesses on matters that affect workers' rights.**

101. **The Special Rapporteur recommends that the International Labour Organization:**

(i) **Pursue standard setting to ensure that workers in informal employment can enjoy the right to freedom of association and to bargain collectively;**

(ii) **Enhance policies and programmes to ensure that workers in vulnerable situations, including migrant workers, domestic workers, workers from minority groups and workers in the informal economy, can exercise their rights to freedom of peaceful assembly and of association;**

(iii) **Pursue standard setting to address governance gaps with regard to the protection of workers' assembly and association rights in global supply chains.**

102. **The Special Rapporteur recommends that the United Nations and multilateral financial institutions:**

(i) **In consultation with trade unions and worker organizations, ensure the promotion and protection of assembly and association rights in their policies and programmes, particularly with regard to policies related to**

**employment, economic development, trade, migration and the rights of specific groups, including women, children, racial/ethnic minorities;**

**(ii) Adopt and effectively implement performance standards and safeguards in public and private lending and tendering that protect workers' assembly and association rights;**

**(iii) Ensure policy coherence through a thorough review and revision of policies, in consultation with trade unions and civil society that may adversely impact the full exercise of the rights to freedom of assembly and association of workers.**

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# Report on the use of the commitment authority and request for a subvention to the Residual Special Court for Sierra Leone

## Report of the Secretary-General

*Summary*

The present report is submitted pursuant to General Assembly resolution 70/248 A of 23 December 2015, by which the Assembly, inter alia, authorized the Secretary-General to enter into commitments in an amount not to exceed $2,438,500 to supplement the voluntary financial resources of the Residual Special Court for Sierra Leone for the period from 1 January to 31 December 2016 as a bridging financing mechanism and requested him to report, during the main part of the seventy-first session of the Assembly, on the use of the commitment authority. The report addresses the use of the commitment authority and options for future financing arrangements for the Court and contains a request for a subvention of $2,980,500 to enable the Court to continue to carry out its mandate in 2017.

* A/71/150.

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# I. Introduction

1. Following an exchange of letters between the Secretary-General and the President of the Security Council, in October and November 2015 (see S/2015/855 and S/2015/856), the Secretary-General requested the General Assembly for a subvention of $6,034,800 for the biennium 2016-2017 for the Residual Special Court for Sierra Leone. Having considered the most recent report of the Secretary-General (A/70/565) and the report of the Advisory Committee on Administrative and Budgetary Questions thereon (A/70/7/Add.30), the Assembly, by its resolution 70/248 A, authorized the Secretary-General to enter into commitments, in an amount not to exceed $2,438,500, to supplement the voluntary financial resources of the Court for the period from 1 January to 31 December 2016 as a bridging financing mechanism and requested the Secretary-General to report on the use of the commitment authority during the main part of its seventy-first session. By the same resolution, the Assembly endorsed the conclusions and recommendations of the Advisory Committee, including the recommendation that the Assembly request that the Secretary-General develop alternative, sustainable options concerning the future financing arrangements for the Court and report to the Assembly. Accordingly, the present report addresses the use of the commitment authority granted for the Court for the period from 1 January 2016 to 31 December 2016 and reports on the result of Secretary-General's consultations with stakeholders to propose more comprehensive funding solutions for the Court. In the light of the projected financial situation of the Court, the report also requests a further subvention for the Court for the period from 1 January 2017 to 31 December 2017.

2. Pursuant to article 3 of the Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Residual Special Court for Sierra Leone, the expenses of the Court shall be borne by voluntary contributions from the international community. The parties and the Oversight Committee may explore alternative means of funding the Residual Special Court. This funding arrangement has posed serious challenges for the continued sustainability of the Court and the effective discharge of its functions. In his letter dated 14 October 2015 (S/2015/855), the Secretary-General informed the Security Council that there would not be sufficient voluntary contributions for the continuation of the Court's work beyond March 2016. The Secretary-General expressed his intention to propose to the General Assembly that the costs of the Court for the biennium 2016-2017 be provided through a subvention under the assessed programme budget. The Secretary-General indicated that the proposal would be a temporary measure to address the current financial situation and that he would consult closely with the Government of Sierra Leone, the Oversight Committee of the Court and associated stakeholders during the biennium in order to seek and propose more comprehensive solutions to the Council and the Assembly.

3. In his reply dated 10 November 2015 (S/2015/856), the President of the Security Council informed the Secretary-General that the Council members had taken note, with certain reservations, of the intention expressed in the letter of the Secretary-General on the understanding that the requested subvention would be on a one-time basis covering the proposed period and would be subsequently reimbursed from the voluntary contributions received by the Residual Special Court. He also stated that the Council members requested that the Secretariat, the Oversight

Committee and the Court intensify their efforts to lower costs and fund the activities of the Court through voluntary contributions.

4. By its resolution 70/248 A of 23 December 2015, the General Assembly endorsed the conclusions and recommendations of the Advisory Committee on Administrative and Budgetary Questions (see A/70/7/Add.30) and authorized the Secretary-General to enter into commitments in an amount not to exceed $2,438,500 to supplement the voluntary financial resources of the Residual Special Court for the period from 1 January 2016 to 31 December 2016 as a bridging financing mechanism.

5. The Residual Special Court expects that, out of the $2,438,500 in commitment authority, an amount of $1,444,400 would be utilized during the period from 1 January 2016 to 31 December 2016. Accordingly, the utilized portion of the commitment would be reported in the context of the first performance report on the programme budget for the biennium 2016-2017 for appropriation. At the time of the writing of the present report, there were no pledges or prospects for additional voluntary contributions; therefore the Court will not have sufficient funds from voluntary contributions to continue its operations in 2017, despite the continued efforts of the Secretary-General, the Government of Sierra Leone, key donors of the Court, including the States members of the Oversight Committee, and the principals of the Court to raise voluntary contributions. Therefore, the Court will require additional funding in the amount of $2,980,500 for the period from 1 January to 31 December 2017.

6. Since any funding approved for 2017 would only be a temporary measure, there is still a need for a long term solution to the financial problems faced by the Residual Special Court. The Secretariat has engaged with the Government of Sierra Leone, the Oversight Committee of the Court, the Registrar of the Court and other stakeholders on alternative options for the future financing of the Court.

## II. Historical background

7. The Residual Special Court was established by the Agreement between the United Nations and the Government of Sierra Leone in August 2010, with the concurrence of the Security Council. The mandate of the Court is to carry out a number of vital residual functions of the Special Court for Sierra Leone. The Special Court was established by an agreement concluded in 2002 pursuant to Council resolution 1315 (2000), in which the Council mandated the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court with the primary objective of prosecuting persons who bore the greatest responsibility for the commission of crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law, committed within the territory of Sierra Leone. The Special Court indicted 13 individuals. Three indicted persons died and one remains at large. Nine individuals, including Charles Ghankay Taylor, former President of Liberia, were convicted and sentenced to terms of imprisonment ranging from 15 to 52 years.

8. On 31 December 2013, the Special Court became the first United Nations-assisted international criminal tribunal to successfully complete its mandate and to close: the residual functions of that body were passed on to the Residual Special Court. These important and ongoing functions include: the supervision of the enforcement of sentences; reviewing convictions and acquittals; conducting contempt of court proceedings or referring them to national jurisdictions; witness and victim protection and support; the maintenance, preservation and management of the archives of the Special Court and the archives of the Residual Special Court itself; responding to requests from national authorities for access to evidence and with respect to claims for compensation; providing defence counsel and legal aid for the conduct of proceedings before the Residual Special Court; and preventing double jeopardy by monitoring national proceedings. The Residual Special Court also has the power to prosecute the remaining fugitive, Johnny Paul Koroma, should he be alive and if his case is not referred to a competent national jurisdiction.

9. The Residual Special Court, which commenced operations on 1 January 2014, has an interim seat in The Hague, with a sub-office in Freetown for witness protection and support and the coordination of defence issues. The present arrangement will remain in effect until such time as the United Nations and the Government of Sierra Leone agree otherwise.

# III. Progress to date

## A. Structure and systems of the Residual Special Court for Sierra Leone

10. Since the commencement of the operations of the Residual Special Court on 1 January 2014, progress continues to be made to review and build on the necessary structures and systems for the proper functioning of the institution. The Residual Special Court is in the process of developing additional personnel policies to regulate internal administrative matters.

11. With regard to the legal and regulatory framework of the Residual Special Court for Sierra Leone, a headquarters agreement between the Netherlands and the Court was ratified by the Parliament of the Netherlands in December 2015. The agreement entered into force on 1 May 2016. Furthermore, in the first half of 2016, the Practice Direction on the Conditional Early Release of Persons convicted by the Special Court for Sierra Leone has been under review.

## B. Activities of the Residual Special Court

12. Sadly, one of the judges of the Residual Special Court, Justice George Gelaga King, passed away on 5 April 2016 in London. Justice King was among the first group of judges to be appointed by the Government of Sierra Leone as a judge of the Appeals Chamber of the Special Court for Sierra Leone, and subsequently to the roster of judges of the Residual Special Court. The Government of Sierra Leone will appoint another judge to replace Justice King.

13. The Residual Special Court continues to successfully and efficiently carry out the residual functions of the Special Court for Sierra Leone, including: investigations and an administrative hearing concerning the violation of conditional early release; the management and preservation of archives and completion of archiving work from the Special Court of Sierra Leone; engaging with witnesses to address their needs; supervision of the enforcement of sentences; and responding to requests for information and evidence from national prosecuting authorities. The following section provides an overview of those activities.

### 1. Protection of victims and witnesses

14. Since Sierra Leone was declared free of the Ebola virus disease on 7 November 2015, albeit with the occurrence of two subsequent cases, the Witness and Victims Protection and Support Office has operated continuously throughout Sierra Leone and the subregion. Pursuant to article 18 of the statute of the Court, the Office continues to actively monitor and support over 100 witnesses and, through regular contact, maintains updated information on them. The Office is currently in the process of completing a comprehensive assessment of every witness, including psychosocial assessments and evaluations of their support and security needs. In recent months, the Office also assisted with investigations into the allegations of a breach of the conditions of conditional early release and consulted with witnesses to ensure that the protective conditions in place had not been violated.

### 2. Judicial and administrative proceedings

15. The Residual Special Court has, since its inception, held various judicial and administrative proceedings concerning the conditional early release applications of Moinina Fofana and Eric Koi Senessie, pursuant to rule 124 of the Court's Rules of Procedure and Evidence, including a motion filed by Mr. Taylor seeking an order for the enforcement of his sentence to be transferred to Rwanda, which was denied.

16. In March 2016, the Residual Special Court held an administrative hearing concerning Mr. Fofana's violation of his conditional early release agreement. Mr. Fofana, a former Director of War of the Civil Defence Forces during the armed conflict in Sierra Leone, was convicted of war crimes and crimes against humanity and sentenced to 15 years in prison, with credit for time served in custody since 2003. After having served two-thirds of his sentence in Rwanda, Mr. Fofana was granted early release on 11 August 2014, subject to certain conditions.

17. Following the fulfilment of conditions, Mr. Fofana was subsequently released in early 2015 to serve the remainder of his sentence in his community, under the supervision of the monitoring authority — that is, the Sierra Leone police. This was the first time that an international criminal tribunal has granted supervised conditional early release to a person convicted of war crimes.

18. In October 2015, the Residual Special Court received information regarding Mr. Fofana's alleged violation of the terms of his conditional early release. Following investigations by the Registry of the Court and the monitoring authority, the Registrar, in accordance with the Conditional Early Release Practice Direction, submitted a report to the President of the Court on 3 March 2016.

19. On 9 March 2016, the President issued an order for detention and transfer of Mr. Fofana to the custody of the Residual Special Court, and for a hearing pursuant to article 12 (F) of the Conditional Early Release Practice Direction. In the order, the President, inter alia, designated Justice Vivian M. Solomon to hear the matter pursuant to article 13(3) of the statute of the Court and ordered the Registrar to set a preliminary hearing of the matter within 7 days. Mr. Fofana surrendered himself to the monitoring authority and was transferred to the custody of the Court.

20. The hearings took place on 16 and 18 March 2016. Mr. Fofana confirmed the allegations, and Justice Solomon ordered his release from the custody of the Residual Special Court, with additional conditions.

21. On 25 April 2016, Justice Solomon issued a disposition ordering that Mr. Fofana be released subject to further stringent and modified conditions and that he undergo an intensive two-week training on the conditions. Mr. Fofana successfully completed the training, which was carried out by the Registry with the assistance of the Defence Office, on key elements of his conditional early release, international humanitarian law, human rights and the functions of the monitoring authority.

22. Justice Solomon expressed grave concern pertaining to the failures of the monitoring authority to abide by the monitoring agreement. In the light of those failures and pursuant to the disposition, the Registrar contacted the authority and entered into discussions regarding its failures and the manner in which the authority proposed to ensure future enforcement of the modified conditions. The authority agreed to undertake a number of measures to ensure adherence to its duties, including the participation of 13 Sierra Leone police officers in the training with Mr. Fofana.

23. Following the training, modified conditional early release and monitoring agreements were signed by Mr. Fofana and the monitoring authority, incorporating the modified conditions and their obligations pursuant to the disposition.

### 3. Supervision of enforcement of sentences

24. Pursuant to article 23 of its statute, the Residual Special Court has the responsibility to supervise the enforcement of sentences for persons convicted by the Special Court for Sierra Leone. Following the death of Alex Tamba Brima, who was convicted by the Special Court, the Residual Special Court currently has seven convicts in custody: one at Frankland Prison, in the United Kingdom of Great Britain and Northern Ireland; and six at Mpanga Prison, in Rwanda.

25. On 9 June 2016, the Government of Rwanda formally notified the Residual Special Court that Mr. Brima had died in Kigali on that date, after a serious illness. Mr. Brima had been a senior leader of the Armed Forces Revolutionary Council and had been serving a 50-year sentence for war crimes and crimes against humanity. He had been found guilty on 11 counts, including acts of terrorism, extermination, murder, rape and the use of child soldiers. The Court carried out an inquest concerning the circumstances surrounding his death and has closely coordinated with the Rwandan and Sierra Leonean authorities on various matters. An autopsy was carried out, and the final autopsy report is awaited.

26. The Registry and the Defence Office continue to maintain close contact with the authorities in Rwanda and the United Kingdom regarding the enforcement of sentences of the prisoners of the Special Court for Sierra Leone, including matters relating to family visits, the status of the prisoners, the provision of legal assistance and any other matters that arise requiring action by the respective organs. Pursuant to the agreement of the Rwandan authorities, family visits resumed in 2016, with the facilitation of the Residual Special Court. In January 2016, the Principal Defender and the Associate Defence Counsel travelled to the United Kingdom for meetings with Mr. Taylor and the Deputy Governor of Frankland Prison to address legal and other matters.

27. Independent monitoring authorities continue to carry out annual assessments on the enforcement of sentences of individuals convicted by the Special Court. On 3 February and 19 April 2016, the International Committee for the Red Cross conducted inspections at Mpanga Prison. Annual inspections have also been conducted at Frankland Prison by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

### 4. Assistance to national authorities and state cooperation

28. In keeping with the aspect of its mandate relating to the provision of assistance to national prosecuting authorities, the Residual Special Court has been receiving and responding to requests for assistance from them. To date, at least 13 such requests have received full responses through the Registry and the Prosecutor's Office, while work continues on follow-up issues on several further requests. Typically, the requests are for information on individuals accused of involvement in war-related crimes during the conflicts in Sierra Leone and Liberia and who now reside in the jurisdictions of the requesting authority pursuant to an asylum or other status. The Court has also received three requests for State cooperation in interviewing certain convicts, two of which have been fully dealt with during the present year. The Court provides full support to these countries, as per its mandate. In addition, the Registry and the Prosecutor's Office received and responded to requests for information or assistance from researchers engaged in academic and media projects.

### 5. Maintenance of archives and court management

29. The maintenance of the archives of the Special Court for Sierra Leone and the Residual Special Court is ongoing. Archivists continue to work to complete the archiving of all final Special Court documents and data and to establish a system that will enable the filing of Residual Special Court documents in real time and allow for a more efficient future file management system. Moreover, the process of archiving by identifying and correcting any gaps in the record is under way. To date, the physical archives of the Residual Special Court occupy approximately 580 linear metres of paper records, and the digital archives occupy approximately 13.4 terabytes.

30. The original archives are maintained at the Dutch National Archives in The Hague. Residual Special Court archivists have recently completed the compilation of a comprehensive index of all archives stored in The Hague, which is being verified by the Dutch National Archives. Upon finalization of the verification

process, the index will be annexed to the memorandum of understanding between the Ministry of Foreign Affairs of the Netherlands and the Residual Special Court on the conditions of storage and access to the Special Court's archives.

31. The Residual Special Court is currently upgrading its electronic records management software. This upgrade was prompted by technical difficulties experienced in the application of the older software and pursuant to the recommendation of an information technology specialist appointed to assist the archiving team in the identification of gaps in the archiving of the documents of the Special Court. The archiving team is consulting with the International Tribunal for the Former Yugoslavia and the International Residual Mechanism for Criminal Tribunals to draw from their experience in the upgrade process.

## 6. Plenary of judges

32. The second plenary of judges was held from 30 November to 4 December 2015 in The Hague. This was the first opportunity, after nearly two years of operations, for the Residual Special Court to review the rules and other procedures necessary for its functioning. The plenary deliberated on proposals for amendments to the Rules of Procedure and Evidence and amended rule 45 thereof. The plenary also deliberated on the drafts of the President's first (2014) and second (2015) annual reports on the operations of the Residual Special Court, which have since been published and submitted to the Secretary-General and the Government of Sierra Leone in accordance with article 26 of the statute of the Court. In addition, elections were held for the position of Vice-President and Staff and Deputy Staff Appeal Judges. The plenary was also presented with and approved the finalization of the jurisprudential legacy project of the Appeals Chamber, entitled "Bearing the greatest responsibility: select jurisprudence of the Special Court for Sierra Leone".

## 7. Legacy and outreach

33. The Special Court for Sierra Leone made a significant contribution to international criminal justice. Among other things, it was the first international criminal court in history to adjudicate cases on crimes relating to child soldiers, attacks on peacekeepers and forced marriage and to recognize forced marriage as a distinct crime against humanity. The preservation of the legacy of the Special Court is an important element of the work of the Residual Special Court, which also seeks to contribute to the development of international criminal justice. In this regard, the judges of the Court participate in activities to promote the legacy of the Special Court and increase the profile of the Residual Special Court. The judges do so at no cost to the Court, as they are remunerated only when they perform judicial functions for the Court at the request of the President, and these activities go above and beyond what is ordinarily expected of the judges. The judges' firm commitment to this cause and their desire to cement the legacy of the Special Court for Sierra Leone was discussed during the second plenary meeting of the judges.

34. Since the most recent report of the Secretary-General (A/70/565), such activities include: (a) the recent visit of Justice Renate Winter to Tajikistan, where she lectured on child rights in armed conflict, relying on the jurisprudence of the Special Court for Sierra Leone as best practice, and her discussions in the Committee on the Rights of the Child with the delegation of the Central African

Republic, relying on the jurisprudence of the Special Court, and with Bulgaria, Gabon, Georgia, Malawi, Nepal, Pakistan and the United Kingdom, concerning former child soldiers, child marriages and child terrorists; (b) the participation of Judge Philip Waki in a judicial dialogue at the African Court on Human and Peoples' Rights and discussions on the theme "Connecting national and international justice", drawing from the experience of the Special Court; (c) the key-note address by Justice Shireen Avis Fisher on the jurisprudence and structure of the Special Court and the future work of the Residual Special Court within the framework of combating impunity at the president's forum at Hobart and William Smith Colleges, in Geneva, United States of America, and her presentation of a paper highlighting the work of the Special Court at the plenary meeting of the twenty-fifth anniversary conference of the International Association of Women Judges, which was attended by 1,000 women judges from 82 countries; (d) the publication of a chapter on the Residual Special Court's Conditional Early Release Practice Direction, co-authored by Justice Fisher and Justice Teresa Anne Doherty, in the *Research Handbook on the International Penal System*; and (e) Justice Doherty's participation in a workshop in Tunis concerning war crimes and sexual violence in conflict, involving discussions on the Convention on the Rights of the Child and the jurisprudence of the Special Court.

35. In the same vein, and at no cost to the Residual Special Court, the Prosecutor continues to carry out activities pertaining to prosecutorial matters concerning the legacy of the Special Court for Sierra Leone and promoting the activities of the Residual Special Court. Such activities include the Prosecutor's attendance at a meeting of the Advisory Board of the International Nuremberg Principles Academy and her participation in a capacity-building initiative hosted in Botswana. The Prosecutor also undertook outreach missions in the south and east of Sierra Leone in 2016. The Prosecutor and Registrar recently participated in an outreach meeting with a civil society group, the Special Court Interactive Forum, in Freetown.

36. The jurisprudential legacy project of the Appeals Chamber is now in its final stage of completion. This will prove an invaluable tool to jurists, researchers and the public, enabling them to review the findings of the Special Court for Sierra Leone in one resource and to compare the Special Court's findings across multiple cases. As part of its launch campaign, the Residual Special Court will provide advance copies to preselected jurists, civil society organizations and scholars as a way to reach out to prospective future donors. It provides a momentous opportunity to increase awareness and the profile of the Residual Special Court.

## IV. Current financial position and fundraising efforts

37. As indicated at the time of writing of the most recent report of the Secretary-General (A70/565), the prevailing financial situation of the Residual Special Court was such that it would not be able to function beyond March 2016 without further voluntary contributions. The Court was only able to operate beyond March 2016 because of the subvention authorized by the General Assembly to supplement the voluntary financial contributions for the period from 1 January 2016 to 31 December 2016. During the first half of 2016, the Court received only €20,000 in voluntary contributions, and, despite ongoing and intensive fundraising efforts, at

this stage there are no prospects for additional voluntary contributions for the remainder of 2016 or for 2017. The current financial situation of the Court is therefore such that it will be unable to continue its work in 2017.

38. The resource requirements for the Residual Special Court amount to $2,980,500. A breakdown of requirements by component and object of expenditure, and funding availability is provided in tables 1 and 2 below.

39. Information on the availability of funds and expenditure until 31 July 2016 is contained in annex I. Information on the distribution of resources between judicial and non-judicial functions is contained in annex II.

Table 1
**Requirements by component and funding availability**
(United States dollars)

| *Component* | *1 January-31 December 2016 Estimated requirements* a | *1 January-31 July 2016 Actual expenditure* b | *1 August-31 December 2016 Projected expenditure* c | *1 January-31 December 2016 Estimated expenditure* d = (b + c) | *2017 Estimated requirements* e |
|---|---|---|---|---|---|
| **Expenditure/requirements** | | | | | |
| 1. Chambers/judges/judicial | 1 124 000 | 127 732 | 188 468 | 316 200 | 572 800 |
| 2. Office of the Prosecutor | 60 000 | 33 733 | 26 267 | 60 000 | 66 200 |
| 3. Registry | 2 412 300 | 1 263 450 | 947 550 | 2 211 000 | 2 341 500 |
| **Subtotal** | **3 596 300** | **1 424 915** | **1 162 285** | **2 587 200** | **2 980 500** |
| **Funds available** | | | | | |
| Balance brought forward (1 January) | | | | 1 121 100 | |
| Pledges and contributions | | | | 21 700 | |
| Anticipated pledges | | | | – | |
| Amount utilized out of the subvention of 2 438 500 | | | | 1 444 400 | |
| **Subtotal** | | | | **2 587 200** | – |
| **Surplus/(shortfall)** | | | | – | **(2 980 500)** |

Table 2
**Requirements by object of expenditure and funding availability**
(United States dollars)

| *Component* | *1 January–31 December 2016 Estimated requirements* *a* | *1 January–31 July 2016 Actual expenditure* *b* | *1 August–31 December 2016 Projected expenditure* *c* | *1 January–31 December 2016 Estimated expenditure* *d = (b + c)* | *2017 Estimated requirements* *e* |
|---|---|---|---|---|---|
| **Expenditure/requirements** | | | | | |
| Posts | 1 102 200 | 598 254 | 427 346 | 1 025 600 | 1 071 400 |
| Common staff costs | 786 300 | 90 536 | 134 504 | 225 040 | 403 300 |
| Compensation to judges | 218 900 | 32 900 | 41 700 | 74 600 | 183 000 |
| Consultants and experts | 51 500 | 8 480 | 23 020 | 31 500 | 31 500 |
| Travel | 352 100 | 106 972 | 75 738 | 182 710 | 290 100 |
| Contractual services | 581 000 | 294 013 | 213 987 | 508 000 | 591 000 |
| General operating expenses | | 285 446 | 238 954 | 524 400 | 394 600 |
| Supplies and materials | | 7 884 | 5 036 | 12 920 | 10 600 |
| Acquisition of furniture and equipment | | 430 | 2 000 | 2 430 | 5 000 |
| **Subtotal** | **3 596 300** | **1 424 915** | **1 162 285** | **2 587 200** | **2 980 500** |
| **Funds available** | | | | | |
| Balance brought forward (1 January) | | | | 1 121 100 | |
| Pledges and contributions | | | | 21 700 | |
| Anticipated pledges | | | | – | |
| Amount utilized out of the subvention of 2 438 500 | | | | 1 444 400 | |
| **Subtotal** | | | | **2 587 200** | – |
| **Surplus/(shortfall)** | | | | – | **(2 980 500)** |

40. The proposed budget of the Residual Special Court is based on its experience over the past two and a half years of its operations. The Court will continue to carry out its functions at an interim seat in The Hague, with a sub-office in Sierra Leone to manage functions, including witness and victim support, defence issues and the coordination of matters related to persons convicted by the Special Court for Sierra Leone. The staff of the Residual Special Court will consist of a total of 13 full-time staff, to be based in those two locations.

41. The Residual Special Court office in The Hague will consist of six staff members: one D-2 Registrar; one P-4 Prosecution Legal Advisor; one P-4 Legal Officer in the Registrar's Office; one P-1 Associate Legal Officer; one P-2 Archiving Officer; and one P-2 Office Manager. In addition, one General Service position, funded by general temporary assistance, will provide archiving assistance.

The Residual Special Court sub-office in Freetown will consist of seven staff members: one P-4 Senior Legal Officer; one P-1 Associate Defence Legal Officer; three Witness Protection and Support Supervisors/Officers (National Professional Officers); one Administrative Assistant (Local level) and one Cleaner (Local level). The Residual Special Court will rely on short-term consultancies, expert services, interns and pro bono services to supplement its staff resources as and when necessary.

42. The estimated actual expenditure for 2016 is $2,587,200, resulting in a balance of $851,200, owing to the fact that the anticipated judicial proceedings for 2016, including the review of convictions, the variation of protective measures for witnesses, the conduct of contempt of court proceedings and conditional early release have not yet occurred. This is, in part, because of the sudden and tragic death of a defence counsel and the vigilant efforts of the Residual Special Court in managing its witness protection programme to guard against reprisals that would instigate contempt proceedings.

43. Notwithstanding the fact that judicial proceedings have not yet been held in 2016, based on the experience of the Residual Special Court, it is anticipated that they will be held in 2017.

44. In the light of the above, the estimated figures include resources for managing judicial and other proceedings to discharge the anticipated judicial mandate of the Residual Special Court for 2017, which will enable it to deal with any judicial matter falling within the requested resource level. The Court is a relatively new entity, still in the early stages of its operations, and its budgetary requirements have been determined and presented in that context. Therefore, the scope of judicial functions and the frequency of the exercise of these functions cannot be fully determined or anticipated. It is expected that the Court will evolve progressively as it continues to execute its mandate, establishing a pattern of activities and requirements. Additional resources will be required for any judicial matter requiring resources beyond the budgeted level for judicial activities. The assumptions also take into account the expenditure for 2016.

45. Annex III to the present report provides details on post requirements by category, level and location for 2017, inclusive of judicial functions, the President and the Prosecutor at the Under-Secretary-General level and the Principal Defender at the P-4 level.

## V. Efficiency measures

46. The Residual Special Court remains committed to reducing costs and increasing efficiency. The Court's sub-office in Freetown is co-located with the National Witness Unit, and its interim seat in The Hague is co-located and continues to share an administrative and technical platform with the International Tribunal for the Former Yugoslavia.

47. The Registrar is the only senior full-time staff member of the Residual Special Court. The President, judges (called from the roster as and when needed), Prosecutor and Principal Defender all work remotely, only as necessary, and are remunerated on a pro rata basis. A total of 13 full-time staff members and 1 position

funded by general temporary assistance provide all of the required support services to the Court.

48. The Residual Special Court also relies on short-term contractors, pro bono assistance and interns to supplement its staff resources. In respect of the administrative hearing in the matter of Mr. Fofana's alleged violations of the terms of his conditional early release, the Court used short-term contractors and its staff rather than increasing staffing levels. The Court further negotiated the use of the national fast-track court in Freetown for the hearing, at no cost to the Court, and the use of that court's staff at a stipend. The Court has also retained the expert services of professionals, such as a press officer and a detention advisor, who will be called upon to work on an ad hoc basis only as necessary and will be remunerated on a pro rata basis. Further, upon request by the Oversight Committee, the Auditor-General of South Africa continues to conduct the annual audit of the Court on a pro bono basis. The next audit is due to take place in November 2016.

## VI. Intensive fundraising efforts for 2016-2017

49. The Oversight Committee and the principals of the Residual Special Court have continued their fundraising efforts. The Court has adopted a proactive fundraising approach by seeking funds for the next three to five years, based on an annual budget of about $3.5 million, while exploring alternative sources for long-term sustainable funding. The fundraising plan targets Member States and regional organizations, including the African Union and the European Union.

50. In an effort to secure funds for 2016 and 2017, letters were sent to Member States drawing their attention to the dire funding situation of the Residual Special Court and seeking their financial support. The Permanent Mission of Sierra Leone to the United Nations sent 80 notes verbale to non-African members of the Group of 77, and the Permanent Representative and Deputy Permanent Representative of Sierra Leone held bilateral meetings with Member States and regional groupings on this issue. In addition, in June 2016, the Secretary-General again sent letters of appeal to all Member States seeking their financial support for the Court. However, no voluntary contributions or pledges have been made thus far.

51. The principals of the Residual Special Court continue to engage in fundraising efforts. As of August 2016, the Court had held a total of 35 meetings to seek funding and provide briefings on its activities. The meetings were held with officials from the host countries, the Governments of Sierra Leone and of the Netherlands, and members of the diplomatic corps, including representatives of Australia, Brazil, Canada, Finland, Germany, India, Ireland, Italy, Japan, Liberia, Nigeria, South Africa, Switzerland, Ukraine, the United Kingdom of Great Britain and Northern Ireland, the United States of America Uruguay and Venezuela (Bolivarian Republic of), as well as with the European Union delegation to Sierra Leone, civil society representatives and some United Nations agencies. The Court's principals intend to engage in another round of intense fundraising efforts during the second half of 2016 with members of the diplomatic corps in the host countries and to visit certain capitals to solicit funding from Member States.

52. The members of the Oversight Committee have been preoccupied with exploring options for the future financing of the Residual Special Court. They are committed to continuing to engage with Member States on the financial situation of the Court.

53. Despite these efforts, two rounds of appeals to all 193 Member States in 2015 and 2016 and more than 185 fundraising meetings held since the Residual Special Court commenced operations, the Court's financial situation remains dire, with no prospects for future voluntary contributions.

## VII. Future financing arrangements for the Residual Special Court

54. The Secretary-General expressed concern about the future financing of the Residual Special Court in his previous report to the General Assembly (A/70/565). In its report on the request for the subvention (A/70/7/Add.30), the Advisory Committee on Administrative and Budgetary Questions recommended that the Assembly request the Secretary-General to develop alternative options concerning the future financing arrangements for the Court and to report on the use of the commitment authority and on the result of his consultations with stakeholders to propose more comprehensive funding solutions during the main part of its seventy-first session. That recommendation was endorsed by the Assembly in its resolution 70/248.

55. The alternative options for the future financial arrangements for the Residual Special Court that have been explored are: (a) funding from the Government of Sierra Leone; and (b) funding from the United Nations and the provision of administrative support to the Court by the International Residual Mechanism for Criminal Tribunals.

### A. Funding from the Government of Sierra Leone

56. As one of the parties to the Agreement on the Residual Special Court, the Government of Sierra Leone could consider funding the Court. This could entail either the Government providing all the funding for the Court or providing funding for a portion of the costs while the rest is covered by other means.

57. The provision of funding from the Government of Sierra Leone to the Residual Special Court would enhance the sense of national ownership of the institution and would reduce or eliminate reliance on unpredictable voluntary contributions. Since, for practical and legal reasons, it might not be possible to transfer all of the functions of the Court to national authorities, it would remain an independent organization and would retain its international character even if it were funded by the Government. There are examples of United Nations-assisted tribunals that are funded in part by the Government of the State concerned while they remain fully independent in character and in their operations, for example the Special Tribunal for Lebanon and the Extraordinary Chambers in the Courts of Cambodia.

58. Following consultations with the Government of Sierra Leone, it became clear that the option of the Government funding the Residual Special Court was not viable. While the Government fully supports the work of the Court and appreciates the importance of its mandate and the need for its continued existence, the Government is not in a position to fund the Court and will not be in such a position in the near future. This is primarily because the Government has been constrained by the unfortunate circumstances of the Ebola virus disease that has afflicted the country in recent years, and the Government's priority is to help the country to recover from that crisis.

## B. Funding from the United Nations and administrative support from the International Residual Mechanism for Criminal Tribunals

59. The second alternative option for the future financing of the Residual Special Court is the provision of funding from the United Nations, a matter that must be decided by the General Assembly, including the amount and form of the funding and to the length of time it should to continue to fund the Court.

60. Providing United Nations financial support to the Residual Special Court would be appropriate, given the very close and special link between the Court and the United Nations. The Court was established by an agreement between the United Nations and Sierra Leone, and both the Residual Special Court and its predecessor, the Special Court for Sierra Leone, derived their mandate from the Security Council (see resolution 1315 (2000) and S/2010/385). The Council supported the Special Court in various ways during the period of its operations, including by providing it with troops from the United Nations Mission in Liberia (UNMIL) for its security (see resolution 1626 (2005)), and by mandating UNMIL to arrest and transfer Mr. Taylor to the Special Court (see resolution 1638 (2005)). The Council also continued to offer strong support to the Special Court in the completion of its mandate and to the Residual Special Court as it commenced its functioning (see S/PRST/2012/21). For its part, the General Assembly has authorized the use of United Nations funding for the Special Court and the Residual Special Court on several occasions. The Assembly also recently affirmed the high priority accorded to the work of the Residual Special Court. Moreover, the activities of the Residual Special Court are carried out in furtherance of the purposes of the United Nations, in particular the maintenance of international peace and security, in conformity with the principles of justice and international law, and promoting and encouraging respect for human rights and fundamental freedoms.

61. In addition to securing a stable source of funding, it is essential to seek further cost reductions and efficiencies for the Residual Special Court, as evidenced in the request by members of the Security Council that the Secretariat, the Oversight Committee and Court officials intensify their efforts to lower the costs of the Court (see S/2015/856). A possible cost-reduction measure that has been explored is an arrangement whereby the Court's offices in The Hague would be co-located with the International Residual Mechanism for Criminal Tribunals and the latter would provide administrative support to the Court on a reimbursable basis. The arrangement would replicate the present situation whereby the Residual Special Court office in The Hague is co-located with, and receives administrative support on

a reimbursable basis from the International Tribunal for the Former Yugoslavia. Since the Tribunal is expected to complete its work at the end of 2017, the Mechanism could assume the Tribunal's role as the service provider.

62. As with the arrangement with the International Tribunal for the Former Yugoslavia, the administrative support functions would include budget and finance, information and communications technology, general services, human resources services and procurement. The arrangement would be of a purely administrative nature and would not involve any change in the mandate or functions of the International Residual Mechanism for Criminal Tribunals. The provision of administrative services would be subject to the Mechanism's operational capacity and constraints and the renewal of the Mechanism's mandate. The Residual Special Court would retain its organs, principals and independent legal character and would be responsible for carrying out its own legal, judicial or quasi-judicial residual functions, including witness protection, the supervision of the enforcement of sentences, the review of judgments and sentences, contempt of court proceedings and the trial of the remaining fugitive.

### 1. Potential benefits

63. A financing arrangement involving United Nations funding for the Residual Special Court and the provision by the International Residual Mechanism for Criminal Tribunals of administrative support would have significant benefits. Funding from the United Nations would place the Court on a secure and stable financial footing and would enable senior officials of the Court to focus on its substantive functions instead of on fundraising. The administrative support and co-location arrangement with the Mechanism would result in substantial cost savings from economies of scale, as compared with a stand-alone Court.

64. While the cost savings would be a significant benefit, they are not the only factor in support of the shared administrative platform. Given the similarity in the respective functions and mandates of the Residual Special Court and the International Residual Mechanism for Criminal Tribunals, a shared administrative platform would be sensible from an operational and organizational efficiency perspective. It would enhance synergies of practice and experience between residual mechanisms, with the possibility for further rationalization of functions, which could result in even greater efficiencies and savings.

### 2. Consultations

65. There have been extensive consultations with various stakeholders on the financing arrangement. The Oversight Committee of the Residual Special Court has discussed the options for the future financial arrangements at a number of meetings since early 2015. The Registrar of the Court has also engaged with other international courts and tribunals on the subject. The Office of Legal Affairs has had several exchanges with counterparts in the Government of Sierra Leone, and members of the Security Council have also been informed of the options through informal bilateral meetings.

66. In 2015, the Government of Sierra Leone noted that it had become apparent that voluntary contributions were not a sustainable source of funding for the

Residual Special Court. More recently, the Government has expressed its firm support for the option of funding from the United Nations, the co-location of the Court office in The Hague with the International Residual Mechanism for Criminal Tribunals and the provision to the Court of administrative support by the Mechanism. The Government is of the view that funding from the United Nations would provide the financial stability that has eluded the Court since its inception. It is important for the Government that such an arrangement not affect the independent legal character of the Court or its identity.

67. Similarly, the members of the Oversight Committee fully support the option of funding from the United Nations, complemented by the sharing of an administrative platform between the Residual Special Court and the International Residual Mechanism for Criminal Tribunals. The members consider this to be a more sustainable means of financing the Court, given the reality of the persistent shortage of voluntary financial contributions.

68. In September 2015, the Group of African States wrote to the Secretary-General, noting that funding from unpredictable voluntary contributions had resulted in serious financial difficulties that threatened the continued existence of the Residual Special Court. The Group supported the option of funding the Court through assessed contributions, and took the position that other options would not adequately address the dire financial situation it was facing.

69. In his 2009 report to the Security Council on the administrative and budgetary aspects of the options for possible locations for the archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the seat of the residual mechanism(s) for the Tribunals (S/2009/258), the Secretary-General stated that there was a possible long-term strategic consideration to bear in mind as regards residual mechanisms. In particular, he noted that, rather than establish a series of stand-alone and potentially costly residual mechanisms, there would be a certain logic, and possible economies of scale to be achieved, in leaving the door open for them to be attached to one common administrative hub at some point in the future. The Advisory Committee on Administrative and Budgetary Questions subsequently suggested the possibility of including the Residual Court in the financing arrangements for the residual mechanism for the International Criminal Tribunals (A/67/648, para. 22). The Office of Legal Affairs will consult with stakeholders on this issue in the coming year.

## VIII. Conclusion and recommendations

70. **The Residual Special Court has used the commitment authority with much caution. On the basis of current projections and expenditures thus far, the Residual Special Court anticipates that, of the $2,438,500 commitment authorized for 2016, an amount of $1,444,400 would be used and reported in the context of the first performance report on the programme budget for the biennium 2016-2017.**

71. **The Secretariat has explored two alternative options for the future financing arrangements for the Residual Special Court, namely: (a) funding from the Government of Sierra Leone; and (b) funding from the United**

**Nations and the provision of reimbursable administrative support to the Court by the International Residual Mechanism for Criminal Tribunals.**

72. **In the light of the response from the Government of Sierra Leone and the bleak outlook as regards voluntary contributions, the alternative financing arrangement that would place the Residual Special Court on a secure financing basis is funding from the United Nations, including the provision of reimbursable administrative support to the Court by the International Residual Mechanism for Criminal Tribunals.**

73. **Given the lack of adequate and sustained voluntary contributions necessary for the Residual Special Court to fulfil its mandate, the Secretary-General requests the General Assembly to:**

(a) **Approve a subvention in the amount of $2,980,500 for the period from 1 January 2017 to 31 December 2017 for the Residual Special Court for Sierra Leone, with the understanding that any voluntary contributions received during the remainder of 2016 and in 2017 would reduce the utilization of the funding provided by the United Nations, which would be reported in the performance reports on the programme budget for biennium 2016-2017;**

(b) **Appropriate an amount of $2,980,500 as a subvention to the Residual Special Court for Sierra Leone under section 8, Legal affairs, of the programme budget for 2017.**

# Annex I

## Funds available for the Residual Special Court for Sierra Leone and actual expenditure as at 31 July 2016

### A. Income as at 31 July 2016

(United States dollars)

| | |
|---|---|
| Cash balance brought forward as at 1 January 2016 | 1 121 100 |
| Contributions received from 1 January 2016 to 31 July 2016 | 21 700 |
| Contributions anticipated and pledges, August 2016 to December 2016 | – |
| Subvention received | 2 438 500 |
| **Total** | **3 581 300** |

### B. Expenditure as at 31 July 2016

(United States dollars)

| | *Actual disbursement* | *Obligations* | *Total* |
|---|---|---|---|
| | *(a)* | *(b)* | *(c) = (a) + (b)* |
| January | 126 987 | 20 000 | 146 987 |
| February | 133 148 | 20 000 | 153 148 |
| March | 202 985 | 20 000 | 222 985 |
| April | 232 134 | 20 000 | 252 134 |
| May | 157 901 | 37 000 | 194 901 |
| June | 219 729 | 37 000 | 256 729 |
| July | 161 030 | 37 000 | 198 030 |
| August | – | – | – |
| September | – | – | – |
| October | – | – | – |
| November | – | – | – |
| December | – | – | – |
| **Total** | **1 233 914** | **191 000** | **1 424 914** |

# Annex II

## Requirements by object of expenditure: non-judicial and judicial proceedings: 2017

(United States dollars)

| *Object of expenditure* | *Non-judicial* | *Judicial* | *Total* |
|---|---|---|---|
| Posts | 940 800 | 130 600 | 1 071 400 |
| Common staff costs | 380 300 | 23 000 | 403 300 |
| Compensation to judges | 53 300 | 129 700 | 183 000 |
| Consultants and experts | 31 500 | – | 31 500 |
| Travel | 122 600 | 167 500 | 290 100 |
| Contractual services | 541 000 | 50 000 | 591 000 |
| General operating expenses | 322 600 | 72 000 | 394 600 |
| Supplies and materials | 10 600 | – | 10 600 |
| Acquisition of furniture and equipment | 5 000 | – | 5 000 |
| **Total** | **2 407 700** | **572 800** | **2 980 500** |

# Annex III

## Staffing requirements

### A. Post requirements for the Residual Special Court for 2017 on a full-time basis

| | *Professional category and above* | | | | | | | *National staff* | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| *Location* | *USG* | *D-2* | *P-4* | *P-3* | *P-2* | *P-1* | *Subtotal* | *National Officer* | *Local level* | *Subtotal* | *Total* |
| The Hague | – | 1 | 2 | – | 2 | 1 | 6 | – | – | – | 6 |
| Freetown | – | – | 1 | – | – | 1 | 2 | 3 | 2 | 5 | 7 |
| **Total** | – | **1** | **3** | – | **2** | **2** | **8** | **3** | **2** | **5** | **13** |

*Note*: In addition to the 13 posts,1 position funded from general temporary assistance (Local level) would provide additional archiving support.

### B. Staffing requirements for the Residual Special Court for 2017 by location and component if required for judicial activity (staff to be drawn from the roster)

| | *Professional category and above* | | | | | | | *National staff* | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| *Location and component* | *USG* | *D-2* | *P-4* | *P-3* | *P-2* | *P-1* | *Subtotal* | *National Officer* | *Local level* | *Subtotal* | *Total* |
| **The Hague** | | | | | | | | | | | |
| Judicial | 3 | – | 2 | 1 | – | – | 6 | – | 5 | 5 | 11 |
| Non-judicial | 2[a] | – | – | – | – | – | 2 | – | – | – | 2 |
| **Total** | **5** | – | **2** | **1** | – | – | **8** | – | **5** | **5** | **13** |

[a] It is expected that the President and Prosecutor will be required for judicial activity, as necessary.

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**Seventy-first session**
Agenda item 134
**Programme budget for the biennium 2016-2017**

# Report on the use of the commitment authority and request for a subvention to the Residual Special Court for Sierra Leone

## Report of the Secretary-General

### Corrigendum

Replace table 2 with the table below.

Table 2
**Requirements by object of expenditure and funding availability**
(United States dollars)

| *Component* | *1 January-31 December 2016 Estimated requirements* a | *1 January-31 July 2016 Actual expenditure* b | *1 August-31 December 2016 Projected expenditure* c | *1 January-31 December 2016 Estimated expenditure* d (b+c) | *2017 Estimated requirements* e |
|---|---|---|---|---|---|
| **Expenditures/requirements** | | | | | |
| Posts | 1 102 200 | 598 254 | 427 346 | 1 025 600 | 1 071 400 |
| Common staff costs | 786 300 | 90 536 | 134 504 | 225 040 | 403 300 |
| Compensation to judges | 218 900 | 32 900 | 41 700 | 74 600 | 183 000 |
| Consultants and experts | 31 500 | 8 480 | 23 020 | 31 500 | 31 500 |
| Travel | 352 100 | 106 972 | 75 738 | 182 710 | 290 100 |
| Contractual services | 581 000 | 294 013 | 213 987 | 508 000 | 591 000 |
| General operating expenses | 502 300 | 285 446 | 238 954 | 524 400 | 394 600 |
| Supplies and materials | 17 000 | 7 884 | 5 036 | 12 920 | 10 600 |
| Acquisition of furniture and equipment | 5 000 | 430 | 2 000 | 2 430 | 5 000 |
| **Subtotal** | **3 596 300** | **1 424 915** | **1 162 285** | **2 587 200** | **2 980 500** |

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Please recycle

| *Component* | *1 January–31 December 2016 Estimated requirements* a | *1 January–31 July 2016 Actual expenditure* b | *1 August–31 December 2016 Projected expenditure* c | *1 January–31 December 2016 Estimated expenditure* d (b+c) | *2017 Estimated requirements* e |
|---|---|---|---|---|---|
| **Funds available** | | | | | |
| Balance brought forward (1 January) | | | | 1 121 100 | |
| Pledges and contributions | | | | 21 700 | |
| Anticipated pledges | | | | – | |
| Amount utilized out of the subvention of 2,438,500 | | | | 1 444 400 | |
| **Subtotal** | | | | **2 587 200** | – |
| **Surplus/(shortfall)** | | | | – | **(2 980 500)** |